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89- 1440

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1989 TERM

KNOX COUNTY, TENNESSEE AND SHERIFF JOE FOWLER in his official capacity,

PETITIONERS/DEFENDANTS/
CROSS PLAINTIFFS

vs. NO._____

GOVERNOR NED RAY McWHERTER, COMMISSIONER, W. JEFF REYNOLDS, AND EXECUTIVE DIRECTOR DEBORAH MILLER, in their official capacities,

RESPONDENTS/DEFENDANTS/
CROSS DEFENDANTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW GOVERNING CORRECTIONAL INSTITUTIONS, WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, WHERE IT EXPRESSLY AUTHORIZED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW STATE DEPARTMENTS OF CORRECTION WITHIN THE SIXTH CIRCUIT TO DELIBERATELY ALLOW INMATES SENTENCED TO STATE CUSTODY TO BACK UP AND LANGUISH FOR YEARS AT A TIME IN LOCAL COUNTY JAILS NOT DESIGNED FOR LONG TERM CONFINEMENT?

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS' DECISION RENDERED IN THIS CASE CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IN BENJAMIN vs. MALCOM, 803 F.2d 46 (2nd CIR. 1986), AS WELL AS PRIOR SIXTH CIRCUIT PRECEDENT, WHERE FULL RELIEF FOR THE THIRD PARTY PLAINTIFF'S AND ORIGINAL INMATE PLAINTIFFS FOR UNCONSTITUTIONALLY OVERCROWDED LOCAL JAIL FACILITIES IN KNOX COUNTY, TENNESSEE CANNOT BE OBTAINED WITHOUT UPHOLDING THE PRECISELY TAILORED REMEDY IMPOSED BY THE DISTRICT COURT AGAINST THE ONLY PARTY RESPONSIBLE FOR AND CAPABLE OF RECTIFYING SUCH UNCONSTITUTIONAL OVERCROWDING?

3. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS WHERE THE COURT OF APPEALS REVERSED THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING THIRD PARTY "STATE" DEFENDANTS' ROLE IN PROXIMATELY CAUSING UNCONSTITUTIONAL CONDITIONS IN KNOX COUNTY

JAIL FACILITIES WITHOUT REQUESTING OR REVIEWING THE TRANSCRIPT OF THE EVIDENCE IN THE DISTRICT COURT AND RATHER BY SUA SPONTE TAKING JUDICIAL NOTICE OF "FACTS" NOT CONTAINED IN THE RECORD?

4. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS, WHERE THE PANEL DECIDED THE CASE ON ITS MERITS AFTER: ONE OR MORE OF THE MEMBERS OF THE PANEL WAS PRESENT IN ONE OR MORE SIXTH CIRCUIT RULE 18 SETTLEMENT CONFERENCES WITH SOME OF THE PARTIES; THE PANEL CONVENED A STATUS CONFERENCE ON THE PROPOSED SETTLEMENT; AND STATEMENTS, COMMENTS AND POSITIONS OF THE PARTIES AT THE CONCLUSION OF UNSUCCESSFUL SETTLEMENT NEGOTIATIONS WERE DISCLOSED TO THE PANEL BY BOTH OPPOSING PARTIES AND THE SIXTH CIRCUIT CONFERENCE ATTORNEY?

5. WHETHER THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN HOFFMAN V. BLASKI, 363 U.S. 335 (1960) BECAUSE THE COURT ORDERED VENUE OF THIRD PARTY DEFENDANTS' CLAIM AGAINST THE "STATE" DEFENDANTS TRANSFERRED PURSUANT TO 28 U.S.C. SECTION 1404(a) TO THE MIDDLE DISTRICT OF TENNESSEE NOTWITHSTANDING THAT PLAINTIFF CARVER COULD NOT HAVE BROUGHT THIS ORIGINAL ACTION IN THAT DISTRICT, AND THE STATE DEFENDANTS WAIVED ANY RIGHT TO A TRANSFER BY FAILING TO REQUEST ONE UNTIL THE MORNING OF THE LAST DAY OF THE BIFURCATED TRIAL OF THE CASE?

II. LIST OF PARTIES TO THE PROCEEDING

A. **PLAINTIFF WAYNE DILLARD CARVER**, as class representative of all persons who have been or are confined in the Knox County, Tennessee jail facilities, as sub-class consisting of present and future pre-trial detainees, and sub-class consisting of all Tennessee Department of Corrections sentenced prisoners awaiting transfer to the penitentiary;

B. **DEFENDANT/CROSS PLAINTIFF KNOX COUNTY, TENNESSEE AND SHERIFF JOE FOWLER**, in his official capacity.

C. **DEFENDANTS/CROSS DEFENDANTS, GOVERNOR NED RAY McWHERTER, COMMISSIONER W. JEFF REYNOLDS, AND EXECUTIVE DIRECTOR DEBORAH MILLER**, in their official capacities.

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IV. OPINIONS BELOW

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B. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, C.A. Nos. 89-5341/5369 (11/21/89) (Order clarifying opinion and denying Plaintiff's Petition for Rehearing) (unreported but contained in Appendix, p. 2).

C. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, C.A. Nos. 89-5341/5369 887 F.2d 1287 (6th Cir. 1989). (Appendix, p. 6).

D. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, Civ. No. 3-86-299 (E.D. Tenn. 1/28/89) (Order declaring certain conditions in Knox County Jail facilities unconstitutional) (unreported but contained in Appendix, p. 23).

E. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, Civ. No. 3-86-299 (E.D. Tenn. 3/17/89) (Order and Memorandum Opinion granting Third Party Plaintiffs relief) (unreported but contained in Appendix, p. 26).

V. GROUNDS FOR JURISDICTION

A. Date judgment entered: 10/6/89

B. Date of denial of Petition for Rehearing: 12/29/89

C. 28 U.S.C. Section 1254

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. 28 U.S.C. Section 1404(a) (Change of Venue):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

B. 42 U.S.C. Section 1983 (Civil Action for Deprivation of Rights):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

C. U.S. Constitution Amendment 8 (Bail Punishment):

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D. U.S. Constitution Amendment 14 (Due Process of Law):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATEMENT OF THE CASE

This case arises from a declaratory judgment of the district court filed January 25, 1989 (Appendix, p. 31), finding conditions of confinement in two of three local jail facilities in Knox County, Tennessee to be unconstitutional,

and from subsequent Order of March 17, 1989 (Appendix, p. 35), expressly finding that the proximate cause of such unconstitutional conditions is the presence of inmates sentenced to the custody of the Tennessee Department of Corrections and accordingly ordering the State to remove some of such inmates from the affected facilities. Plaintiff, Wayne Dillard Carver, initiated this action while incarcerated in the Knox County Jail by filing a complaint in forma pauperis which named only Sheriff Fowler and Knox County. Defendants filed an Answer and Third Party Complaint naming the Governor of Tennessee and various State officers in their official capacities alleging that any unconstitutional conditions existing within Knox County facilities were proximately caused by the State Defendants' failure to promptly take into custody prisoners sentenced to the Tennessee Department of Corrections (hereinafter T.D.O.C.). Subsequent amendments to Plaintiff's Complaint were made by appointed counsel to certify the case as a class action and to name the

State Defendants as Co-Defendants in Plaintiff's original claim. The State Defendants filed Rule 12(b) Motions on two occasions but made no pre-trial objection to venue in the Eastern District of Tennessee. On August 10, 12 and 15, 1988, trial was held on the issue of constitutionality of the conditions in the County Jail facilities. Not until trial on the relief phase, held March 6, 1989, did the State Defendants raise an objection to venue.

Prior to the State's refusal in 1985 to accept T.D.O.C. sentenced inmates into their custody the Knox County Jail facilities had no problem with overcrowding. (R. 174: J. Miller at 157-58; Jack Carter at T.R. 231-32; Charles Miller at T.R. 271; Maurice Eady at T.R. 401). However, the State deliberately allowed over 2,300 inmates to back up in local jail facilities. (R. 173: Jeff Reynolds at T.R. 84-5). At the time of the March 6, 1989 hearing, out of a total inmate population of 501, there were 147 T.D.O.C. ready inmates awaiting transport. (R. 173: Kenneth Quindry at T.R. 22-3).

The rated capacity of the facilities is 435. The prisoner/day growth from fiscal year 1985-86 to 1988-89 has risen 867.75% (R. 173: Kenneth Quindry at T.R. 42). The State has allowed T.D.O.C. sentenced inmates to remain in the Knox County Jail facilities continuously from between six months to two years. (R. 174: Charles Miller at T.R. 262; A.C. Willis at T.R. 240). Notwithstanding that the Commissioner of T.D.O.C. readily admitted that the State should be responsible for these persons and that local jails cannot and should not be used to provide additional capacity needed for serious felons, the State had at the time of the trial completed no new prisons since the 1985 Grubbs Order and added only 300 beds to its entire state prison system with full knowledge of the backup this would cause in local jails. (R. 173: Jeff Reynolds at T.R. 80-81; 84-5; Greg Maynard at T.R. 173-4). In the words of the Commissioner of Corrections for Tennessee, the State's plans regarding housing of prisoners is "We are just going to let it go." (R. 173: Jeff Reynolds at T.R. 86).

In a separate case filed by officials of Hamilton County, Tennessee against the T.D.O.C., styled Roberts v. T.D.O.C., No. 89-5307 (October 5, 1989), which was ordered consolidated with the instant case by Order filed April 4, 1989, Judge Merrit stayed the district court's preliminary injunction which required the State to remove T.D.O.C. sentenced inmates from Hamilton County. In the hearing on the State's Motion for a Stay, Judge Merritt stated his belief that the cause of any overcrowding in the local facility was a de facto conspiracy between local bondsmen and local officials to require modest bonds of indigents notwithstanding that there was no contention nor evidence in the record to remotely suggest this. (See Judge Merritt's ruling from the bench from March 16, 1989 and excerpts of the transcript of proceedings attached as Appendix, 64-5). The panel then consolidated for briefing and hearing the Roberts's case with the instant one. After Judge Jarvis' ruling on March 17, 1989, the State filed a Notice of Appeal and sought a stay which was granted on

March 30, 1989 by a panel of this Court presided over by Judge Merritt.

The panel received extensive briefing on the case and heard oral argument on the merits on May 23, 1989. Judge Merritt again made reference in oral argument to local bondsmen having "mystical power" over Sheriff Fowler although the instant record is devoid of evidence to suggest this and such a belief is contrary to the facts. Knox County was given approximately three minutes to argue its case.

Subsequent to briefing and argument, in an unprecedented Order entered July 11, 1989, the panel requested the Senior Sixth Circuit Conference Attorney to attempt to negotiate a settlement of the two cases. (Appendix, p. 28). Pursuant to this Order, all the parties, including Petitioners herein, had extensive telephonic and in person negotiations. Notwithstanding the mandates of Sixth Circuit Rule 18(3) and (4) and Fed. R. Evid. 408, on September 1, 1989, the counsel for the Plaintiff Class inmates submitted a letter to the judges of the

panel, setting forth their position on the proposed settlement. (Attached as Appendix, p. 50). It was only after the above letter was written to the panel that another letter issued from the Sixth Circuit Senior Conference Attorney advising the Panel that the parties in the Roberts case had reached a settlement and that the Plaintiff class inmates in this case were agreeable thereto but that Knox County was not. (Appendix, p. 55). This letter issued over strenuous objections by Knox County that such revelations to the Panel violated Rule 18 and their right to an impartial hearing on the merits. (Appendix, p. 60).

In similarly unprecedented fashion, the panel ordered all parties to appear in Cincinnati on September 20, 1989 for a hearing on the status of the proposed settlement. Again, disclosure was required regarding the parties' settlement positions. On information and belief, prior to the entry of a final Order by the panel in this case, Judge Merritt attended a meeting between counsel for the State, counsel for Hamilton County, counsel for

the Class of Plaintiff inmates in this case and U.S. District Judge Thomas Higgins and in that meeting discussed substantive matters involving settlement proposals. Counsel for Knox County was notified of this meeting only hours before it convened in Nashville, Tennessee, and were not informed that Judge Merritt would be participating in these negotiations. The panel subsequently issued its opinion on October 16, 1989.

The Court of Appeals issued on November 21, 1989 an Order "clarifying" its reported Opinion and denying Plaintiff's Petition for Rehearing. (Appendix, p. 3). Defendants/Cross Plaintiffs' Petition for Rehearing and Suggestion for Reharing en banc, (Appendix, p. 1), was denied December 29, 1989. (Appendix, p. 2).

By letter dated January 11, 1990, the Clerk of the Sixth Circuit advised the parties that "the certified record was never sent to this Court on appeal. (Appendix, 49). The District Court and the Sixth Circuit Clerk's office confirmed that the Court of Appeals never requested the transcript of evidence heard by the

District Court.

Petitioners' counsel assumed that since appellant ordered the entire transcript of the proceedings that the Court of Appeals would have it to review. However, the District Court Clerk's office sends the record to the Sixth Circuit, only if the panel requests it, which it did not. Moreover, the State Appellants failed to incorporate into the "joint" appendix, the trial transcript pages designated for inclusion therein by Defendants/Cross Plaintiffs and Plaintiffs in their respective appellate briefs. Thus, the only part of the trial transcript even considered by the panel of the Sixth Circuit were the few pages selected by the State Appellants for inclusion into their "joint" appendix.

VIII. BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

28 U.S.C. Section 1343(3)

28 U.S.C. Section 1331

42 U.S.C. Section 1983

IX. ARGUMENT

1.WHETHER THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW GOVERNING CORRECTIONAL INSTITUTIONS, WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, WHERE IT EXPRESSLY AUTHORIZED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW STATE DEPARTMENTS OF CORRECTION WITHIN THE SIXTH CIRCUIT TO DELIBERATELY ALLOW INMATES SENTENCED TO STATE CUSTODY TO BACK UP AND LANGUISH FOR YEARS AT A TIME IN LOCAL COUNTY JAILS NOT DESIGNED FOR LONG TERM CONFINEMENT?

The following facts in this case are undisputed. All parties recognize that the Knox County Facilities are designed for housing pre-trial detainees, and misdemeanants and not for long term incarceration of sentenced felons. (R. 173: Mike Jenkins at T.R. 489; Jeff Reynolds at T.R. 99). The State is by statute responsible for housing T.D.O.C. sentenced felons. T.C.A. Section 41-1-506. The State should be responsible for these felons, and local jails cannot and should not be used to provide additional capacity for serious felons. (R. 173: Jeff Reynolds at T.R. 99). The State has made a deliberate choice to thrust its responsibilities for housing these inmates

to counties fully understanding that the back up in local jails would probably take place. (R. 173: Greg Maynard at T.R. 173-4). At the time of trial, the State had only added 300 beds to its prison system since 1981 and have constructed no new prisons since the 1985 Grubbs Order. (R. 173: Jeff Reynolds at T.R. 80-81). The State has taken no action to house their own prisoners. (Id. at 83). The State has deliberately allowed over 2,300 inmates to back up in local jail facilities. (Id. at 84-5). State sentenced inmates have remained in the Knox County Jail facilities continuously from between six months to two years, many never seeing the light of day. (R. 174: Charles Miller at T.R. 262; A.C. Willis at T.R. 240). This has caused the Knox County Jail facilities to go from never exceeding their Tennessee Corrections Institute rated capacities to continuously exceeding them. (R. 174: J. Miller at 157-58). On the day of the March 6 hearing, the Knox County Jail facilities had a rated capacity of 435, and a total inmate population of 501 out of which 147

were T.D.O.C. sentenced inmates. (R. 173: Kenneth Quindry at T.R. 22-3). The State's deliberate disregard of the rights of the inmates sentenced to State custody and rights of Knox County and Sheriff Fowler has been sanctioned by the panel decision in this case. The State has knowingly forced its inmates to live on the floor in cells lined with mattresses for months at a time with little room for exercise, no opportunity for outdoor exercise, no fresh air, and in many instances, not even windows. (R. 174: J. Miller at T.R. 151-3). The problems faced by Sheriff Fowler and his staff by being forced to house sentenced prisoners long term under such conditions is obvious. The district court, the Second Circuit in Benjamin v. Malcom, 803 F.2d 46 (2d Cir. 1986), and a previous panel of the Sixth Circuit in Tate v. Frey, 735 F.2d 986 (6th Cir. 1984), recognized what pathetic public policy this represents. The panel opinion in the instant case expressly authorizing the willful conduct of the State contravenes important public policy and mandates correction by this Court.

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS' DECISION RENDERED IN THIS CASE CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IN BENJAMIN vs. MALCOM, 803 F.2d 46 (2nd CIR. 1986), AS WELL AS PRIOR SIXTH CIRCUIT PRECEDENT, WHERE FULL RELIEF FOR THE THIRD PARTY PLAINTIFF'S AND ORIGINAL INMATE PLAINTIFFS FOR UNCONSTITUTIONALLY OVERCROWDED LOCAL JAIL FACILITIES IN KNOX COUNTY, TENNESSEE CANNOT BE OBTAINED WITHOUT UPHOLDING THE PRECISELY TAILORED REMEDY IMPOSED BY THE DISTRICT COURT AGAINST THE ONLY PARTY RESPONSIBLE FOR AND CAPABLE OF RECTIFYING SUCH UNCONSTITUTIONAL OVERCROWDING?

In Benjamin v. Malcom, 803 F.2d 46 (2d Cir. 1986), the Second Circuit affirmed the District Court's grant of a preliminary injunction requiring the State of New York to remove "state ready" prisoners housed in the New York Correctional Facilities within 48 hours after their papers for transfer were completed. The facts as found by the District Court in Benjamin are indistinguishable from the facts of record in the instant case and as is found by the District Court. The Second Circuit noted in Benjamin that full relief against the unconstitutionally overcrowded conditions in the City Jail could not be obtained

through an Order against the City alone and further that the remedy of requiring the State to take prisoners for whom they had legal responsibility was a less extreme remedy than enjoining the City from arresting and prosecuting drug dealers and other criminals. Id. at 53. A previous panel of the Sixth Circuit reached the same result on similar facts in Tate v. Frey, 735 F.2d 986 (6th Cir. 1984). Notwithstanding that Tate is the most apposite case from the Sixth Circuit, the instant panel failed to even consider or discuss it in reaching the facially conflicting decision in this case. In shaping permanent injunctive relief to rectify constitutional violations, federal courts must tailor relief which is the least intrusive remedy, best accommodates concerns of federalism, closely tracks its findings and conclusions and places responsibility for rectifying the unconstitutional conditions on the responsible entity. As with the remedy crafted by the Courts in Benjamin and Tate, the district court's remedy in this case requiring the State to remove enough

state sentenced inmates to bring the Knox County Facilities within their rated capacity and to remove a state prisoner each time a newly sentenced prisoner reentered a Knox County Facility precisely meets these criteria. The well reasoned 61 and 11 page Memorandum Opinions of the district court fully explain and justify why the district court imposed the same remedies as did the Second Circuit in Benjamin and the previous panel of the Sixth Circuit in Tate. Even a cursory review of the record (which the instant panel of the Sixth Circuit failed to do) displays the ample support for the remedy imposed by the district court. In contrast, the analytically flawed, legally incorrect, factually unsupported and practically incomprehensible published opinion of the Court of Appeals divests jurisdiction of every District Court within Tennessee, except for one Judge in the Middle District, to order any relief against the State of Tennessee which impacts on the State prison population. The Opinion of the Sixth Circuit bars the doors to every district court in the State

of Tennessee, except for one Judge in the Middle District, from any challenge by an incarcerated litigant to the conditions of his confinement in a local jail facility.

The Court of Appeals concedes the accuracy of the District Court's findings of "historical facts" that, since the imposition of a cap on the State's prison population in 1985, the State has willfully chosen to allow its prisoners to languish for years at a time in local facilities designed for short term confinement rather than meet its responsibility to build additional prison space. Then, it expressly sanctions this pathetic correctional policy in direct conflict with the Second Circuit decision in Benjamin. This Court should accordingly exercise its discretion to resolve this conflict between the Circuits and reverse the Court of Appeals' authorization to the State of Tennessee to continue violating the constitutional rights of persons incarcerated in overcrowded local jails.

3. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS WHERE THE COURT OF APPEALS REVERSED THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING THIRD PARTY "STATE" DEFENDANTS' ROLE IN PROXIMATELY CAUSING UNCONSTITUTIONAL CONDITIONS IN KNOX COUNTY JAIL FACILITIES WITHOUT REQUESTING OR REVIEWING THE TRANSCRIPT OF THE EVIDENCE IN THE DISTPICT COURT AND RATHER BY SUA SPONTE TAKING JUDICIAL NOTICE OF "FACTS" NOT CONTAINED IN THE RECORD?

The combined effect of the Court of Appeals' failure to review and rely on the transcript of the proceedings in the District Court with the panel's consideration of facts not contained in the record constitutes such a departure from appropriate appellate review as to require this Court to exercise its supervisory powers by granting certiorari review. An appellate court has no basis for evaluating a Court's findings of fact in the absence of evidence of record before the District Court. Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1052 (Fed.Cir. 1986). Obviously, without the benefit of a transcript of all the evidence taken by the District Court,

the Court of Appeals cannot make a meaningful evaluation of a claim of error. See Herron v. Rozelle, 480 F.2d 282, 288 (10th Cir. 1983). A court should decline appellate review without the benefit of a complete transcript of proceedings below. See Brattrud v. Town of Exline, 628 F.2d 1098, 1099 (8th Cir. 1980).

In this case, Knox County first learned that the panel of the Court of Appeals did not even consider or review the transcript of the evidence when counsel was advised by letter of January 11, 1990 from the Clerk of the Court of Appeals that the certified record was never sent from the District Court in Knoxville to the Court of Appeals in Cincinnati. (See Appendix, p. 49). The only portion of the transcript placed in the "joint" appendix prepared by the State Defendants were the few excerpts which the State Defendants felt supported their position. The State Defendants failed to include in the "joint appendix any of the transcript designated by either Knox County or the inmate Plaintiffs for inclusion in the joint appendix. Thus,

the panel of the Court of Appeals had only the one sided view of the evidence propounded by the state from which to assess the state's claim of error. That the panel of the Court of Appeals reviewed only those selected portions of the transcript submitted by the state is evident from its holding that the District Court's conclusion that the unconstitutional conditions of the Knox County facilities were the direct result of overcrowding caused by TDOC sentenced inmates was unsupported by the record. 887 F.2d. 1294. Even a cursory review of the record, had the panel felt inclined to make one, belies this ruling.

The panel's failure to review the record was exacerbated by its taking judicial notice of unwarranted factual conclusions having no support in the record. The presiding judge of the panel, Judge Merrit, took judicial notice both in this case and in the consolidated case of Dalton Roberts vs. Tennessee Department of Corrections, 89-5307 of his misbelief that the real cause of overcrowding in local county jails was a defacto conspiracy

between bondsmen and government officials to require bonds of indigent misdemeanants, which in Judge Merritt's opinion, should not be required to post a bond. (See transcript of ruling from the bench on March 16, 1989 at page 6, found in the appendix p. 64-65). The record in both cases is devoid of such evidence, and this judicially noticed "fact" is contrary to reality. However, Judge Merritt noted that this defacto conspiracy "was in existence when I came to the bar 30 years ago. It was in existence when my great grandfather came to bar 150 years ago." (Id). The result of Judge Merritt and the panel taking judicial notice of this erroneous "fact" manifests itself in the panel's statement that: "There was no showing of what effect an aggressive pre-trial release program for detainees charged with minor offenses would have on the inmate population of the county facilities." 887 F.2d. at 1294. If there was no evidence introduced on this point, the panel departed from accepted appellate review to surmise that had evidence on the point been introduced, the fact would have

been proven.

The combined effect of the panel's failure to review the transcript of the proceedings in the District Court together with its taking judicial notice of unproven and nonexistence "facts" is such a departure from proper appellate review as to warrant supervisory correction by this Court.

4. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS, WHERE THE PANEL DECIDED THE CASE ON ITS MERITS AFTER: ONE OR MORE OF THE MEMBERS OF THE PANEL WAS PRESENT IN ONE OR MORE SIXTH CIRCUIT RULE 18 SETTLEMENT CONFERENCES WITH SOME OF THE PARTIES; THE PANEL CONVENED A STATUS CONFERENCE ON THE PROPOSED SETTLEMENT; AND STATEMENTS, COMMENTS AND POSITIONS OF THE PARTIES AT THE CONCLUSION OF UNSUCCESSFUL SETTLEMENT NEGOTIATIONS WERE DISCLOSED TO THE PANEL BY BOTH OPPOSING PARTIES AND THE SIXTH CIRCUIT CONFERENCE ATTORNEY?

For the instant panel to have decided this case after having participated in settlement conferences and having been apprised that Knox County was the party who could not agree to a proposed settlement is in direct conflict with Federal Rule of Evidence 408 and the Sixth

Circuit's own local Rule 18 (3) and (4). Knox County objected to such disclosures and pointed out the clear conflict with the aforementioned rules as well as the potential prejudice to Knox County and the appearance of partiality to which this procedure would subject the court. (See appendix at page 60). The appearance of impropriety and partiality is aggravated by the fact that the panel's decision on the instant appeal resulted in the worst case scenario to Knox County: the Court's remanding for a probable finding of unconstitutionality of conditions in the local jail yet with instructions to the District Court to disregard evidence that the state, not Knox County, proximately caused the constitutional violation. The panel's extraordinary deviation from the accepted and usual course of appellate review in this case is compelling grounds for this Court to exercise its supervisory powers and grant certiorari.

5. WHETHER THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN HOFFMAN V. BLASKI, 363 U.S. 335 (1960) BECAUSE THE COURT ORDERED VENUE OF THIRD PARTY DEFENDANTS' CLAIM AGAINST THE "STATE" DEFENDANTS' TRANSFERRED PURSUANT TO 28 U.S.C. SECTION 1404(a) TO THE MIDDLE DISTRICT OF TENNESSEE NOTWITHSTANDING PLAINTIFF CARVER COULD NOT HAVE BROUGHT THIS ORIGINAL ACTION, IN THAT DISTRICT, AND THE STATE DEFENDANTS WAIVED ANY RIGHT TO A TRANSFER BY FAILING TO REQUEST ONE UNTIL THE MORNING OF THE LAST DAY OF THE BIFURCATED TRIAL OF THE CASE?

In Hoffman v. Blaski, 363 U.S. 335 (1960), this Court rejected the position adopted by the panel of the 6th Circuit that, if at the time of transfer, the transferee forum would have venue over the action, then it is one where the action might have been brought for purposes of 28 U.S.C. Section 1404(a). The Hoffman Court quoted with approval the Seventh Circuit's statement that:

> If when a suit is commenced, Plaintiff has a right to sue in that district, independently of the wishes of the Defendant, it is a district where the action might have been brought. If he does not have that right, it is not a district where it might have been brought, and it is immaterial that the Defendant

> subsequently makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum.

Id. at 344. (emphasis added). The panel readily conceded that Plaintiff Wayne Dillard Carver could not have instituted this action in the transferee forum, the Middle District of Tennessee. (Slip Opinion at p. 9). The cases relied upon by the panel with the exception of Wyndham Associates v. Bintliff, 398 F.2d. 614 (2nd Cir. 1968), cert. denied 393 U.S. 977 (1968), lend no support to transfer in this case because they all involved transfer to districts where the original action might have been brought. Both the Panel's decision in this case and the Second Circuit's decision in Wyndham are contrary to Hoffman. This Court in Hoffman rejected the claim that Section 1404 should be broadly construed beyond its unambiguous language to achieve the interest of justice. 363 U.S. 344. The Court held that no conduct of the Defendant after suit has been instituted

can add to the forums where an action might have been brought. Id. at 343. This includes conduct of the Defendant in impleading a third party action was error.

The Panel's ruling that the State did not waive objection to venue is also in direct conflict with Hoffman wherein the Court stated: "A Defendant properly served with process by a court having subject matter jurisdiction waives venue by failing seasonable to assert it..." 363 U.S. at 344.

Since the panel decision is direct conflict with the clearly established law announced by this Court in Hoffman, this Court should grant review in this case.

X. CONCLUSION

For each and all of the foregoing reasons, the Court should grant Petitioners Petition for Writ of Certiorari on each of the five issues presented therein.

Respectfully submitted this 7 day of March, 1990.

KNOX COUNTY AND
SHERIFF JOE FOWLER

BY: Robert H. Watson, Jr.
ROBERT H. WATSON, JR.

BY: John Duffy
JOHN C. DUFFY

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing has been served upon Mr. Charles Burson, Mr. Dean Rivken, and Mr. John Eldridge, by United States Mail, postage prepaid, this 7 day of March, 1990.

BY: John Duffy
JOHN C. DUFFY

WATSON, REEVES and BEELER
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KNOXVILLE, TN 37901
(615) 522-3803

89- 1440

Supreme Court, U.S.
FILED
MAR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED
OCTOBER, 1989 TERM

KNOX COUNTY, TENNESSEE AND
SHERIFF JOE FOWLER in his
official capacity,

PETITIONERS/DEFENDANTS/
CROSS PLAINTIFFS

vs. NO._____

GOVERNOR NED RAY McWHERTER,
COMMISSIONER, W. JEFF REYNOLDS,
AND EXECUTIVE DIRECTOR DEBORAH
MILLER, in their official
capacities,

RESPONDENTS/DEFENDANTS/
CROSS DEFENDANTS.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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1 Cover Sheet of Petition for Rehearing and Suggestion for Rehearing En Banc of Knox County, Tennessee and Sheriff Joe Fowler

2 Order denying Defendants' Petition for Rehearing and Suggestion for Rehearing en banc.

3 Order Clarifying the Panel's October 6, 1989 decision and denying Plaintiff's Petition for Rehearing.

6 The Sixth Circuit's decision in Wayne Dillard Carver v. Knox County, et al v. Ned Ray McWherter, et al, No. 89-5341/5369 (for publication filed October 6, 1989

28 July 11, 1989 Order in consolidated actions of Carver v. Knox County, et al v. McWherter, et al, and Dalton Roberts v. Tennessee Department of Corrections, instructing the Sixth Circuit Conference Attorney to initiate settlement negotiations.

31 Order of the District Court filed January 25, 1989 in Carver v. Knox County, et al v. McWherter, et al, Civ. No. 3-86-299 declaring certain conditions in the Knox County Jail Facilities to be unconstitutional.

49 Order and Memorandum Opinion of the District Court filed March 17, 1989 in Carver v. Knox County, et al v. McWherter, et al, Civ. No. 3-86-299 declaring the proximate cause of the unconstitutional overcrowded conditions to be the presence of T.D.O.C. sentenced inmates and granting Knox County relief.

50 Letter dated January 11, 1990 from the Sixth Circuit Court of Appeals Clerk's Office advising the certified record was never sent to the Court for purposes of the Appeal.

55 Letter from Plaintiff inmate's attorneys and the State Attorney General to the individual panel members setting forth the parties' position in the proposed settlement.

60 Letter dated September 1, 1989 from the Sixth Circuit Conference Attorney to Judge Pierce Lively setting forth the parties' positions on the proposed settlement.

63 Letter from counsel for Knox County proposing disclosure to the panel members the positions of the parties regarding the proposed settlement.

49 Ruling from the bench on March 16, 1989 by Judge Merritt in the companion case of Dalton Roberts v. T.D.O.C., No. 89-5307.

Respectfully submitted this 7 day of March, 1990.

KNOX COUNTY AND
SHERIFF JOE FOWLER,

BY: Robert H. Watson
ROBERT H. WATSON, JR.

BY: John Duffy
JOHN C. DUFFY

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing has been served upon Mr. Charles Burson, Mr. Dean Rivken, and Mr. John Eldridge, by United States Mail, postage prepaid, this 7 day of March, 1990.

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NO. 89-5341/5369

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE DILLARD CARVER, ET AL

PLAINTIFF,

vs.

FILED 10/19/89
LEONARDGREEN,
CLERK

SHERIFF JOE FOWLER AND KNOX COUNTY, TENNESSEE,

DEFENDANTS,

VS.

GOVERNOR NED RAY McWHERTER, ET AL,

DEFENDANTS/CROSS-PLAINTIFFS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF KNOX COUNTY, TENNESSEE AND SHERIFF JOE FOWLER

ROBERT H. WATSON, JR.
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(615) 522-3803

NO. 89-5341/5369

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE DILLARD CARVER,

PLAINTIFF/APPELLEE,

vs.

ORDER-**FILED**
12/29/89
LEONARD
GREEN,CLERK

KNOX COUNTY, TENNESSEE, JOE FOWLER, SHERIFF,

DEFENDANTS/CROSS-PLAINTIFFS
APPELLEES

BEFORE: MERRITT, CHIEF JUDGE; NELSON, CIRCUIT JUDGE; AND LIVELY, SENIOR CIRCUIT JUDGE

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTER BY ORDER OF THE COURT

NO. 89-5341
NO. 89-5369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE DILLARD CARVER,

PLAINTIFF,

VS.

KNOX COUNTY, TENNESSEE AND JOE FOWLER, SHERIFF,

DEFENDANTS/CROSS-PLAINTIFFS

ORDER-**FILED**
11/21/89
LEONARD GREEN
CLERK

VS.

NED RAY McWHERTER, ET AL,

DEFENDANTS/CROSS-DEFENDANT/APPELLANTS

BEFORE: MERRITT, CHIEF CIRCUIT JUDGE; NELSON, CIRCUIT JUDGE; AND LIVELY, SENIOR CIRCUIT JUDGE

The inmate plaintiffs have moved for clarification of this court's October 6, 1989 decision in the above-styled case, or in the alternative, have petitioned for rehearing. We find no grounds for granting rehearing, and the petition is denied.

With respect to the motion for clarification, we believe a careful

reading of the court's opinion makes clear the court's holdings in the matters discussed in the motion. In order to remove any doubts about the meaning of the opinion in this important case, however, the court makes the following observations:

(1) This court held that the district court's findings of historical facts, as distinguished from its conclusions respecting these facts, were not clearly erroneous. (Slip Op. at 15). We also held that the district court committed legal error in concluding on the basis of the "totality of the circumstances" that the facts so found constituted an Eighth Amendment violation. (Slip Op. at 16).

(2) This court reasoned that the district court's conclusion that impermissible or unconstitutional conditions existed in the Knox County facilities as the direct result of the presence of T.D.O.C. sentenced prisoners was erroneous because the district court appeared to base its conclusion at least in part on the assumption that overcrowding in a penal institution, in and of itself, creates a constitutional violation. The law is to the contrary. See Rhodes v. Chapman, 452 U.S. 337, 345-47 (1981). The district court's erroneous assumption appears to have led to the unsupportable conclusion that the presence of TDOC sentenced prisoners in the Knox County facilities was the proximate cause of the unconstitutional conditions it found to exist.

(3) This court ordered a remand that requires the district court to reexamine its conclusions by applying the correct legal analysis. It should first analyze local conditions in terms of food, ventilation, condition of cells and holding areas, medical care, acts of violence, sanitation, ratio of guards to inmates, and eating arrangements, and other similar practices and circumstances and then fashion a remedy for the "uniquely local" practices and circumstances causing any unconstitutional violations found to exist. To the extent that the presence of TDOC sentenced prisoners may be found to contribute to unconstitutional conditions, however, the district court may not order a remedy that requires removal of such prisoners from the Knox County facilities. instead, the district court is to transfer that portion of the case to the MIddle District of Tennessee Following transfer, the United States District Court for the Middle District of Tennessee will fashion a remedy related to the presence of TDOC sentenced inmates in the county facilities following procedures outlined in the Roberts settlement order. This will prevent the district court from entering orders for removal of TDOC sentenced inmates from Knox County facilities that are inconsistent with the statewide remedy being implemented by the district court in the Middle District of Tennessee.

ENTERED BY ORDER OF THE COURT

_____

CLERK

NO. 89-5341
NO. 89-5369

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE DILLARD CARVER,

Plaintiff-Appellee,

v.

KNOX COUNTY, TENNESSEE
JOE FOWLER, SHERIFF

Defendants/Cross-Plaintiffs, Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

v.

NED RAY McWHERTER, et al.,

Defendants/Cross-Defendants/
Appellants.

Decided and Filed _____

BEFORE: MERRITT, Chief Judge; NELSON, Circuit Judge; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge. This is an action challenging conditions of confinement in the penal facilities of Knox County, Tennessee. The original defendants, the county and its sheriff, filed a third party complaint against state officials responsible for administering the Tennessee penal system. The county defendants contended that the state's policies and practices have caused

unconstitutional conditions to exist in the county facilities and that these conditions form the basis of the inmates' claims against the county and the sheriff. When the third party complaint was filed there was an ongoing class action in another district within the state dealing with conditions of confinement in all state-run penal institutions. We conclude that the district court, after making findings of fact and declaring the rights of the inmates, should have transferred a portion of this action to the district court in which the state-wide litigation is ongoing for determination of an appropriate remedy.

I.

This action was commenced on April 25, 1986, in the Unites States District Court for the Eastern District of Tennessee by Wayne Carver, a pretrial detainee in the Knox County jail, who filed a pro se complaint pursuant to 42 U.S.C. § 1983. The complaint alleged that the jail was overcrowded, causing unsanitary living conditions. It also charged that the jail afforded insufficient opportunity to access to legal material. After determining that the complaint was not frivolous, a magistrate granted Carver's motion for appointment of counsel. Appointed counsel filed an amended complaint naming Knox County and the sheriff as defendants and alleging in greater detail violations of the Eighth and Fourteenth Amendments.

The defendants filed an answer denying all allegations of constitutional

violations and a third party complaint against the governor, the commissioner of the state department of corrections and other state officials. the third party complaint alleged that the state operated an unconstitutional penal system. In order to relieve overcrowding in state facilities, the United States District Court for the Middle District of Tennessee had entered an order in Grubbs v. Norris, a class action, severely curtailing the admission of new inmates into the state system. Since Knox County housed a number of prisoners sentenced to the Tennessee Department of Corrections (TDOC) while awaiting transfer to a state facility, the Grubbs order caused a back-up in the Knox County facilities, which consisted of a jail, a penal farm and an intake center. The county defendants alleged that the effect of this order and a later order entered in Grubbs that prohibited acceptance of any new prisoners in to the state's reception centers was to greatly increase overcrowding in the Knox County facilities. The county defendants charged that actions and omissions of the third party defendants had caused the county defendants to become vulnerable to prosecution and to be named as defendants in inmates' lawsuits. The third party complaint sought declaratory and injunctive relief.

The original plaintiff then filed a second amended complaint, naming as defendants the governor and the other state officials first brought into the action by the county defendants' third party complaint, and charging them under § 1983 with responsibility for the alleged

unconstitutional conditions in the Knox County facilities. The district court denied the state defendants' motion to dismiss the claims against them.

On July 7, 1988, the plaintiff filed yet another amended complaint, asserting a class action "on behalf of all persons who have been or are confined in the Knox County Jail." The complaint listed two sub-classes: One consisting of present and future pretrial detainees in the jail and the other consisting "of all Tennessee Department of Corrections sentenced inmates awaiting transfer to the penitentiary." The amended complaint described injuries to TDOC-sentenced inmates as well as to pretrial detainees and other county prisoners. It charged that the overcrowded conditions were the "direct result" of the state's failure and/or neglect to remove inmates from the [j]ail, after each inmate ha[d] been sentenced to the Department of Corrections." The amended complaint sought relief against both county and state defendants. On JUly 15 the district court entered an order certifying the class action as requested by the plaintiff. The issues were joined on the basis of the amended class action complaint and the third party complaint.

II.

A.

The district court conducted a bench trial on August 1988 and issued its decision on January 25, 1989. The court found serious overcrowding in two of the

three Knox County facilities. The court recognized that overcrowding, in and of itself, is not unconstitutional but found that overcrowding in the Knox County facilities resulted in specified conditions that violated the inmates' constitutional rights. Among these conditions were increased violence at both the jail and the county intake center, a breakdown in the classifications system, which added to the violence, a lack of exercise programs and equipment, unsanitary living conditions, and a lack of adequate ventilation. the court also found that the jail's unwritten policy concerning use of the law library and procedure for copying legal materials resulted in "occasional violation" of inmates' constitutional right to court access. In addition, the court found that "the presence of TDOC-sentenced inmates is the primary cause of the overcrowded conditions at the Jail and the Intake Center."

The district court recognized that the Eighth Amendment prohibition against cruel and unusual punishment defines the rights of convicted inmates and that the Fourteenth Amendment's Due Process Clause defines the rights of pretrial detainees. Applying these constitutional provisions the court found that both groups of inmates suffered constitutional deprivations that flowed directly from the overcrowded conditions at the jail and the intake center. The court ordered the state an county defendants to propose plans for reducing or eliminating the impermissible conditions found to exist in the facilities. Both groups of defendants

filed proposed plans. However, the state defendants did so under protest, stating that adoption of the plan it proposed would interfere with the ongoing relief being fashioned by the Middle District of Tennessee in Grubbs.

The district court adopted the major provision of the state defendants' proposal and ordered the removal of 80 TDOC-sentenced inmates form the Knox County facilities within 30 days from February 21, 1989. Thereafter, the court ordered the simultaneous removal of the TDOC-sentenced inmate with the longest incarceration upon the admission of each additional TDOC-sentenced inmate.

B.

On March 6, 1989, the state defendants moved for a change of venue to the Middle District of Tennessee with respect both to issues involved in the cross-claims between the defendants and to relief issues. In support of their motion, the state defendants cited both the ongoing Grubbs case dealing with overcrowding in state facilities and a temporary restraining order issued against the state in another overcrowding case before a different judge in the Eastern District of tennessee involving the Hamilton County facilities (Roberts v. Reynolds, 6th Cir. No. 89-5307). The movants argued that the overcrowding cases should be consolidated before one judge and coordinated with the ongoing relief in Grubbs to avoid "chaos." This motion was denied from the bench.

The district court filed another order and opinion on March 17. The court found that the presence of TDOC-sentenced inmates was the proximate cause of the unconstitutional conditions it had found in the Knox County facilities and that "the only adequate and complete remedy" was for the state defendants to remove additional prisoners until it reduced the overall population to no more than the rated capacity of both facilities. the court ordered that this reduction be accomplished on or before May 30, 1989. This order was made final by entry of a Rule 54(b) certification. The certification was not required to make the order appealable, however, as this court has jurisdiction over appeals from interlocutory orders granting injunctions. 28 U.S.C. § 1929(a).

The district court denied the state defendants' motion for a stay pending appeal. On March 30 the present panel granted an emergency motion for stay after hearing oral arguments, and ordered the appeal expedited. The case has been fully briefed and argued and is not ready for decision. Upon consideration we deny the county defendants' motion to dismiss the appeal and proceed to the issues.

III.

A.

This case cannot be considered in isolation. What began as one inmate's effort to obtain relief from local conditions that he considered unconstitutional has been converted into

an action that affects the entire Tennessee penal system. The third party complaint charged that the conditions complained of by Carver resulted from unconstitutional operation of the state system. Thereafter, appointed counsel for Carver sued the state defendants directly and eventually converted this case into a class action embracing a sub-class consisting "of all Tennessee Department of Correction sentenced inmates awaiting transfer to the penitentiary."

The county defendants themselves, in the third party complaint, referred to the June 21, 1985, order in Grubbs imposing a cap on the number of prisoners that the department of corrections was permitted to house in Tennessee's twelve adult penal institutions. In the same pleading the county defendants advised of a later order in Grubbs prohibiting the acceptance of any new prisoners into the state's reception centers. At this point it should have been clear that any remedy for conditions int he Knox County facilities that required removal of TDOC-sentenced prisoners could conflict with the remedy being fashioned in Grubbs.

B.

Grubbs v. Bradley,[1] 552 F. Supp. 1052

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[1] As the state made personnel changes, new defendants were substituted and the style of the case changed. Grubbs v. Norris, previously referred to, is the same case as Grubbs v. Bradley. Hereafter the case will be cited as "Grubbs."

(M.D. Tenn. 1982), was filed as a class action in 1980, asserting that living conditions of the inmates in Tennessee's twelve state penal institutions violated Eighth and Fourteenth Amendment guarantees. The certified class consisted of "all present and future adult inmates committed to the custody of the Tennessee Department of Corrections." Id. at 1055. Chief Judge L. Clure Morton of the Middle District of Tennessee conducted a bench trial in November and December 1981. The court recognized that in addition to the more than 7,000 inmates housed in the twelve state institutions in 1981, "[a]n additional 300 or so state prisoners" were housed in various county jails. Id. at 1059. Although the class certification included these inmates, the court determined that conditions in the county jails would "not be directly reviewed." Id. At the time this determination was made, nothing indicated that the decision in Grubbs would have an impact on the county jails housing state prisoners.

In his decision on the merits Judge Morton found seven specific conditions in various institutions that violated constitutional standards. Id. at 1131-32. However being "acutely sensitive to the delicate balance that must be struck in our federal system between the protection of constitutional rights by federal courts and the state's ability to administer its own affairs," id. at 1130, Judge Morton proceeded cautiously in seeking a remedy. He determined to appoint a special master

and required the defendants to submit plans for remedying the impermissible conditions on a strict timetable. Id. at 1132. Judge Morton gave three reasons for his decision to appoint a special master, two of which bear upon the present case:

> First, the various conditions complained of are intimately interrelated, and care will need to be taken that the remedy developed in response to an existing violation does not lead to other constitutional violations. Similarly, the reduction of population at one institution must not be accomplished in such a way that another facility becomes unconstitutionally overcrowded.

Id. at 1131

Following Judge Morton's retirement, Grubbs was assigned to District Judge Thomas A. Higgins, on whose docket it remains. Following a hearing on June 21, 1985, Judge Higgins entered an order on June 27, 1985, requiring the TDOC to reduce the population of state penal institutions to a total of 7,019 inmates by December 31, 1985. Judge Higgins subsequently entered an order prohibiting admission of new or additional inmates in to the system's reception centers until the population at one or more reception center was reduced to or below its "designated capacity." An order on October 23, 1986, raised the overall inmate limit to 7,249. These three orders necessarily caused the impact of Grubbs to

reach beyond the twelve state prisons originally considered. One inevitable result of these orders was a slowdown in the movement of TDOC-sentenced prisoners from county jails to state facilities. Thus, when the county defendants and the class action plaintiffs in the present case sought to require the immediate removal of TDOC-sentenced inmates from the Knox County facilities, their goals and the ongoing remedy in Grubbs conflicted. The state defendants brought the Grubbs orders to the attention of the district court and pointed out the conflict.

The district court held a hearing on the state defendants' motion to transfer the remedy portion of the Knox County case to the Middle District of Tennessee. We can understand and sympathize with the district judge's dilemma. He had found unconstitutional conditions in penal facilities within his court's jurisdiction and felt compelled to remedy them. Once he concluded that the "proximate cause" of these impermissible conditions was the presence of TDOC-sentenced inmates in the Knox County facilities, however, his chosen solution directly conflicted with the remedy being fashioned on a state-wide basis by Judge Higgins. It was because this conflict was apparent to this court that we issued the stay order in March.

IV.

The county defendants make two venue arguments: (1) that the state defendants waived any objection to venue by making a

motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., and (2) that the suit could not be transferred because the Eastern District of Tennessee was the only available venue for Carver's original complaint. The class action inmates assert that the state defendant's belated motion for transfer was properly denied because Carver's complaint concerned only conditions "uniquely local" to Knox County and thus forum non conveniens considerations favor leaving the action in the Eastern District of Tennessee. They also contend that they are not members of the Grubbs class.

The district court did not rely upon waiver in denying the motion to transfer, and neither will this court. In fact, 28 U.S.C. § 1404(a)[2] does not require a motion; a district court may transfer a case sua sponte. The district court denied the motion because it perceived no conflict between the latest orders in Grubbs and the orders requiring the removal of TDOC-sentenced inmates from the county facilities. Turning to the second argument, the fact that the original

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[2] 28 U.S.C. § 1404(a) provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

We regard this as an "interest of justice" case.

Carver claim could have been filed only in the Eastern District of Tennessee became irrelevant when the county defendants and the original plaintiff impleaded the state defendants, all of whom resided in the Middle District of Tennessee where the state capital is located. The third party complaint and amended complaints changed the scope of this action. Once the district court permitted these pleadings, certified a class that included Grubbs class members, and found that the class action plaintiffs' claim arose by reason of events controlled by the state defendants in the Middle District of Tennessee, no venue limitations prevented a transfer. See Bolding v. Holshouser, 575 F.2d 461, 466-67 (4th Cir.) (after noting that a prisoners' action against state officials residing in different districts within the state may be brought in any of the districts, the court added that upon a proper showing the district court might conclude to transfer such a case to a different district from the one in which it was filed), cert. denied, 439 U.S. 837 (1978).

We disagree also with the assertion that the class action plaintiffs in the present case are not members of the Grubbs class. The subclass in the present case consisting of all TDOC-sentenced inmates awaiting transfer to the penitentiary clearly is included within the Grubbs class consisting of all present and future adult inmates committed to the custody of the TDOC. No one claims that any of the class plaintiffs in the present cases are juveniles.

V.

A.

This is not a case for application of ordinary forum non conveniens considerations to a motion for transfer. the State of Tennessee should not be subjected to competing and conflicting orders as it attempts to solve the prison overcrowding problems that it shares with many other states. The records in Grubbs and in the present case demonstrate that the legislative and executive branches of state government are making sincere efforts to solve the problem. this court stated its view of the matter in Grubbs v. Norris, 870 F.2d 343, decided March 17, 1989, the same day that the district court issued the final order on the merits int he present case. In Grubbs v. Norris, we reversed the district court's denial of a motion by the Metropolitan Government of Nashville and Davidson County to intervene in the original Grubbs case, stating:

> [W]e believe that the problem of prison over-crowding is one that should not be addressed on a level of competitive divisiveness. It is a problem endemic to the entire state; thus, the solution should reflect its global contours. Unless the affected counties are heard, the solution will be meted out in a fractured, piecemeal fashion. This is an unsatisfactory procedure both for the potential litigants and for the potential litigants and for the courts who

> will adjudicate the various lawsuits. We therefore find that addressing the problem in one lawsuit is preferable to encouraging a patchwork case-by-case approach.

870 F.2d at 347.

This court reached the same conclusion in Groseclose v. Dutton, 829 F.2d 581 (1987). There we reversed the district court's denial of a motion to consolidate with Grubbs another "conditions of confinement" case in the Middle District of Tennessee, involving conditions of death row. In determining that consolidation should have been ordered we stated, "To allow two or more district judges to issue directions to prison officials simultaneously would be to create what the Goff v. Menke, 672 F.2d 702, 705 (8th Cir. 1982)] court aptly characterized as an 'inefficient' situation, fraught with potential for inconsistency, confusion, and unnecessary expense." 829 F.2d at 584. While both Grubbs v. Norris and Groseclose v. Dutton involved actions already pending in the Middle District of Tennessee and did not require transfers under § 1404(a), we believe the controlling considerations are the same.

B.

In Goff v. Menke, 672 F.2d 702 (8th Cir. 1982), Chief Judge Lay ordered consolidation into one class action of all federal actions relating to conditions of confinement in the Iowa State

Penitentiary. The state had not requested consolidation, but the court of appeals found that the existence of several standing injunctive orders created "a risk of inconsistent adjudications, and confuses and exhausts prison officials, inmates and judicial officers." Id. at 705. The same risks are created by injunctive orders entered by different federal judges that impose conflicting obligations on state corrections officials.

The United States Court of Appeals for the Fifth Circuit faced a situation similar to the one we now confront in Hamilton v. Morial, 644 F.2d 351 (1981). The head of corrections in Louisiana requested "a writ of supervisory mandamus to stay further proceedings in federal district courts within the State...dealing with interrelated issues of unconstitutional overcrowding in the state penitentiary, parish prisons, and parish and city jails." Id. at 352. At the time, twenty-five such cases either were pending in the federal courts or had already produced court orders. The court of appeals determined that the litigation should "be considered as a unified whole and not in piecemeal fashion." Id. at 353. Concluding that it was faced with a "situation...that involves extraordinary circumstances which permit extraordinary action," id., the court issued an order to all federal district courts in Louisiana with pending actions "or in which a future action may be filed seeking to alleviate crowded conditions in the [state penitentiary], or any prison or jail operated or maintained by a political

subdivision of the [state that] may be affected directly or indirectly by an order...limiting inmate population," to transfer such actions to a single district court. Id. at 354. the court directed a judge in the transferee district to "determine whether all or any part of such [transferred]actions [should] be consolidated for hearing or disposition." Id. The order also directed the transferee judge to determine "whether any portions of such actions not dealing with or affected by limitations on inmate population should be transferred back to the district from which it was transferred." Id.[3]

The court in Wright v. Jackson, 505 F.2d 1229 (4th Cir. 1974), ordered a class action prison inmate case transferred from the Eastern District of Virginia to the United States District Court for the District of Columbia. By special act of

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[3] Since preparation of this opinion, the Fifth Circuit has issued a decision in which it ordered transfer of a portion of the remedy phase of a prison overcrowding case to the judge presiding over a case involving a statewide challenge to the Texas prison system. As in this case, county defendants in a prisoner suit had filed a third party complaint against state officials charging that the State's failure to remove state-sentenced prisoners to state facilities promptly after conviction and sentencing was a primary cause of overcrowding in the county's penal facilities. See In re Clements, 881 F.2d 145 (5th Cir. 1989).

Congress the District of Columbia Department of Corrections operates a prison at Lorton, Virginia. The inmates at Lorton filed a class action in the Eastern District of Virginia claiming that disciplinary procedures at the prison violated due process. Noting that two other actions by inmates of the D.C. system raised the same issues and sought similar relief, the court of appeals ordered the transfer. The court reached this conclusion even though it involved transferring a case to a district within a different circuit. The court stated:

> Common sense, as well as sound judicial administration, argues against having two separate decrees from a single court will suffice. Piece-meal fashioning of remedies for the inmates of the District prison system, prison by prison, by the District Court of the District of Columbia and in the District Court of Virginia, is an intolerable waste of judicial effort and imposition on both courts when the entire issue can be resolved by the formulation of a single decree by one of the District Courts that will apply system-wide. All this can easily be avoided by transferring this case to the District Court of the District of Columbia, to be decided along with the other cases pending before it. In that way, there can be a single decree binding on all prisons in the District's

> prison system; in that way there will be uniformity in the treatment of inmates of any of the prisons; and finally, in that way, the administrator of the District Correctional System will be supervised by a single court and that the court of the very jurisdiction which had imposed on the inmates of the prison their sentences. In sum, administrative convenience, judicial efficiency, and avoidance of any possibility of conflict between courts all combine to support the wisdom of transfer in this case on principles of comity...

Id. at 1232 (footnote omitted).

The same reasoning employed by these courts leads to our conclusion in the present case.

VI.

This case requires us to exercise our supervisory authority over the district courts. Otherwise, the federal courts will have created an intolerable situation for the State of Tennessee contrary to principles of comity and federalism. In effect, this action and a similar one in the Eastern District of Tennessee - Roberts v. Reynolds - are disputes between counties and the State of Tennessee rather than disputes between inmates and their custodians. We neither overlook nor excuse the fact that the State has permitted unconstitutional conditions to

exist within its prison facilities. That fact was established in Grubbs. However, the only common sense approach to solving the state-wide problem is to ensure that the authority commanding changes that will produce a constitutionally satisfactory system speaks with a single voice.

A.

We have concluded that the best approach to the problem presented by this case is to sever the claims against the state defendants and transfer them to the Middle District of Tennessee. In effect, the case now includes two separate lawsuits. As indicated earlier, the Middle District of Tennessee is a district in which the actions against the state defendants "might have been brought." 28 U.S.C. § 1404(a). As in Wyndham Associates, Inc. v. Bintliff, 398 F.2d 614 (2d Cir.), cert. denied, 393 U.S. 977 (1968), this is a case where severance of certain claims is proper and the administration of justice will be served by severing and transferring the claims against the state defendants.

Neither the county nor the state defendants challenge the accuracy of the district court's findings of historical facts in the present case. Those findings are not clearly erroneous and are affirmed. However, the district court's conclusion that all of the impermissible conditions it found present in the Knox County facilities are the direct result of the presence of TDOC-sentenced inmates is not supported by the record. There was no showing of what effect an aggressive

pretrial release program for detainees charged with minor offenses would have on the inmate population of the county facilities. Nor was there any showing that the increase in numbers of state prisoners exacerbated each of the conditions. These omissions may result from the fact that the inmate plaintiffs prepared their case and marshalled evidence to support an attack on "uniquely local" conditions. Some of the conditions, such as the lack of adequate ventilation and exercise areas, appear to relate to the structures in which the inmates are housed, not to the numbers of inmates. Finally, though it referenced particular conditions in specified locations, the district court appeared to base many of its conclusions of law finding constitutional violations on a "totality of the circumstances" approach, particularly in light of its conclusion that the presence of TDOC-sentenced inmates was the "proximate cause" of the violations it found. This court has rejected a "totality of the circumstances" approach to deciding Eighth Amendment claims of cruel and unusual punishment. Walker v. Mintzes, 771 F.2d 920, 925-26 (6th Cir. 1985); Groseclose v. Dutton, 829 F.2d 581, 585 (6th Cir. 1987). That approach likewise is not permitted in dealing with Fourteenth Amendment claims by pretrial detainees.

B.

The judgment of the district court is reversed and the claims against the county defendants are remanded to that court for redetermination under proper standards and

without the unsupported conclusion that the presence of TDOC-sentenced inmates was the proximate cause of the violations found. If, upon reconsideration, constitutional violations are found to exist, the district court will require the county defendants to take such remedial steps as may be appropriate and necessary to eliminate "uniquely local" conditions of confinement that violate the constitutional rights of inmates.

Upon remand the district court will transfer the third party complaint and the claims against the state defendants in the amended complaint to the United States District Court for the Middle District of Tennessee where they will be assigned to Judge Higgins. Following the procedures adopted by this court in the Settlement Order entered in Roberts on October 5, 1989, Judge Higgins will fashion a remedy for any unconstitutional conditions found to exist in the Knox County facilities because of the presence of TDOC-sentenced inmates. By committing the relief portion of these claims to Judge Higgins, we are assured that the Knox County remedy will be consistent with the ongoing remedial process in Grubbs. References to Judge Higgins shall apply to any successor judge handling Grubbs in the event that case should be assigned to another judge of the Middle District of Tennessee.

So ordered.

NO. 89-53-7 and 89-5341/5369

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 89-5307

DALTON ROBERTS, County Executive of Hamilton County; FLOYD FULLER; Superintendent of the Hamilton County Workhouse; H.G. EVATT, Sheriff of Hamilton County,

PLAINTIFFS/APPELLEES,

VS.

TENNESSEE DEPARTMENT OF CORRECTIONS, and its Commissioner; W. JEFF REYNOLDS, individually and in his capacity as Commissioner; CHARLES BURSON, State Attorney General,

DEFENDANTS/APPELLANTS

NOS. 89-5341/5369

WAYNE DILLARD CARVER,

PLAINTIFF/APPELLEE,

vs. ORDER

KNOX COUNTY, TENNESSEE, JOE FOWLER, SHERIFF,

DEFENDANTS/CROSS-PLAINTIFFS APPELLEES

BEFORE: MERRITT AND NELSON, CIRCUIT JUDGES; AND LIVELY, SENIOR CIRCUIT JUDGE

The Court has expedited these appeals and now has both cases under submission. They are the most recent chapters in the extensive history of litigation over the constitutionality of conditions of incarceration in Tennessee. No fewer than three United States District Courts are involved in potentially conflicting orders directly affecting the Tennessee Department of Corrections and indirectly affecting other county jails and workhouses not parties to either of these cases. This court already has stayed the injunctive relief ordered in these two cases to avoid piecemeal excursions into a statewide problem.

Before issuing our decisions in these cases, we suggest that the parties enter into discussions for the purpose of seeking a comprehensive solution to the problems giving rise to the litigation. We are asking the Court's Senior Conference Attorney to contact counsel for all parties immediately to determine their willingness to explore the possibilities of such a settlement. Such discussions will be held in accordance with Rule 18, Rules of the Sixth Circuit, and will not affect the opinions of the Court in these cases in the event that a settlement is not reached.

The Conference Attorney is asked to report back to us within ten (10) days whether the parties are willing to meet with the Senior Conference Attorney in an effort to find a satisfactory solution to

these vexing problems. If counsel do so agree, we will withhold our opinions for a reasonable period of time to accommodate the negotiations.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

WAYNE DILLARD CARVER,

PLAINTIFF,

VS. NO. 3-86-299

FILED 1/25/89
U.S. DISTRCIT COURT

KNOX COUNTY, ET AL,

DEFENDANTS/THIRD PARTY PLAINTIFFS,

VS.

NED McWHERTER, ET AL,

THIRD PARTY DEFENDANTS.

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, the court hereby GRANTS Plaintiffs' request for relief as contained in their amended complaint to the extent that the court DECLARES as follows:

I. That the following conditions of confinement are unconstitutional as applied to both the pre-trial detainees and Tennessee Department of Correction ("TDOC") sentenced inmates:

A. The overcrowded conditions;

B. The level of violence (in the

drunk tank only);

C. The lack of a meaningful classification system;

D. The lack of basic necessities;

E. The lack of sanitation (in the drunk tank only);

F. The lack of meaningful indoor exercise and the lack of outdoor exercise if confined for more than one year;

G. The lack of adequate medical screening at the time of initial incarceration.

H. The lack of adequate dental care; and,

I. The lack of meaningful access to the Courts.

II. That the following conditions of confinement at the Knox County Jail Intake Center are unconstitutional as applied to both pre-trial detainees and TDOC sentenced inmates:

A. The overcrowded conditions;

B. The level of violence (in the drunk tank only);

C. The lack of a meaningful classification system;

D. The lack of basic necessities;

E. The lack of sanitation (in the

drunk tank only);

F. An inadequate ventilation system;

G. The lack of meaningful indoor exercise and the lack of outdoor exercise if confined for more than one year; and

H. The lack of adequate medical screening at the time of initial incarceration.

III. That there presently exists no conditions of confinement at the Knox County Jail Annex which are unconstitutional as applied to either the pre-trial detainees or the TDOC sentenced inmates.

As set forth more specifically in the Memorandum Opinion, the Court will hear proof in the near future[4] as to how the defendants propose to reduce, if not completely eliminate, the above constitutionally impermissible conditions of confinement at the Knox County Jail and the Knox County Jail Intake Center to the extent that these conditions have been found by the court to have occurred.

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[4]Counsel of record are ORDERED to appear before the undersigned on February 3, 1989, at 1:15 p.m. in the Main Courtroom of the United States Courthouse, 501 Main Avenue, Knoxville, Tennessee, to set this matter for further hearing and to discuss the scope of that hearing. It is anticipated by the Court that this matter will be set within the next 30 to 60 days.

Entry of a final judgment will be deferred pending consideration of this additional proof and plaintiffs' response thereto.

ENTER:

_____

JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

WAYNE DILLARD CARVER,

PLAINTIFF,

VS. NO. 3-86-299

FILED 3/17/89

KNOX COUNTY, ET AL, **U.S. DISTRICT COURT**

DEFENDANTS/THIRD PARTY PLAINTIFFS,

VS.

NED McWHERTER, ET AL,

THIRD PARTY DEFENDANTS.

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, the court hereby GRANTS defendants/third-party plaintiffs' ("county defendants" request for relief as contained in their third-party complaint to the extent that:

1. The court DECLARES that the proximate cause of the unconstitutionally overcrowded conditions and problems attendant thereto at the Knox County Jail ("Jail") and the Knox County Jail Intake Center ("Intake Center") is the presence of the Tennessee Department of Correction ("TDOC") sentenced inmates; and

2. The county defendants' request for injunctive relief is GRANTED to the extent that:

(a) The defendants/cross defendants ("state defendants") are ORDERED to remove from the custody of the county defendants such additional TDOC sentenced inmates until the overall inmate population is reduced to no more than the TCI rated capacity in the Jail and in the Intake Center on or before May 30, 1989;

(b) for each additional TDOC sentenced inmate who is incarcerated in either the Jail or the Intake Center (or even the Knox County Jail Annex), the state defendants are ORDERED to "simultaneously"[1] remove a TDOC sentenced inmate from the Knox County Jail facilities; and

(c) the court will ALLOW the Knox County jail facilities to exceed the TCI rated capacity by fifteen percent (15%) but for no more than five (5) consecutive days or ten (10) days out of any thirty (30) days.

3. It is finally ORDERED that the county defendants are ORDERED to reduce the overall population in the drunk tank of both the Jail and the Intake Center whereby:

(a) no more than sixteen (16)

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[1]The word "simultaneously" shall be defined as set forth in Footnote #3 in the accompanying Memorandum Opinion.

inmates shall be housed in either drunk tank at any one time;

(b) no inmate shall be housed in either drunk tank for more than forty-eight hours; and

(c) no inmate shall be housed in either drunk tank for more than two (2) days out of any thirty (30) days.

Entry of final judgment will be deferred pending consideration of certain of the individual plaintiffs' claims for monetary damages from either the state and/or county defendants.

ENTER

_____
JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

WAYNE DILLARD CARVER,

PLAINTIFF,

VS. NO. 3-86-299

KNOX COUNTY, ET AL,

FILED 3/17/89
U.S. DISTRICT COURT

DEFENDANTS/THIRD PARTY PLAINTIFFS,

VS.

NED McWHERTER, ET AL,

THIRD PARTY DEFENDANTS.

MEMORANDUM OPINION

This class action came before the court on March 6, 1989 for the trial of the following issues which had been bifurcated by previous order [see Doc. 103]: (1) the cause of the overcrowded conditions at the Jail and the Intake Center[1]; and (2) the appropriate injunctive

[1]During the trial of this matter in August, 1988, the evidence was overwhelming that the presence of TDOC sentenced inmates was (and continues to be) the primary cause of the overcrowded conditions at the Jail and the Intake Center and the court so found in its earlier Memorandum Opinion entered on

relief[2]. After consideration of the

January 25, 1989 [see Doc. 132, p. 16]. Nevertheless, the state defendants contended during the status conference on February 21, 1989 that they had been denied an opportunity to present their proof on this issue. it is for that reason that the court heard further proof from both the state and county defendants on this issue

[2]The court notes that it has already ordered certain injunctive relief on February 24, 1989 as a result of the status conference held on February 21, 1989 [see Doc. 145]. In particular, the court ordered the State to remove 80 TDOC sentenced inmates within 30 days from the date of the status conference. The court would emphasize that both the number of TDOC sentenced inmates to be removed within this time frame and the time frame itself were suggested by the state defendants in their Plan to Address Crowding in Knox County Facilities [see Doc. 142]. It is important to emphasize this facet of the state defendants' proposed plan since the memo issued by Commissioner Reynolds to all Tennessee sheriffs on february 22, 1989 indicated, "this order was issued over the protest of the State of Tennessee and after the State mae it clear that such an order would adversely affect the other 94 counties of the State." [See Ex. "A" to Doc. 152A]. In other words, this court did not arbitrarily choose the number of TDOC sentenced inmates to be removed, nor the

pleadings, testimony and exhibits introduced at trial, the parties' brief and applicable law, the court makes the following findings of fact and conclusions of law. Rule 52(a), Federal Rules of Civil Procedure.

Findings of Fact

1. The court's findings of fact issued in its Memorandum Opinion of January 25, 1989 [see Doc. 132, pp. 1-32] are hereby adopted by reference. See Rule 10(c), Federal Rules of Civil Procedure.

2. Since October, 1985, the State of Tennessee has permitted a progressively increasing number of TDOC sentenced inmates to remain in county jails throughout the State of Tennessee. W. Jeff Reynolds, the current Commissioner of the Department of Correction, testified that there are approximately 2,300 TDOC sentenced inmates incarcerated in county jails and work houses.

3. As a result of this policy and practice of the State of Tennessee, the county defendants have been forced to house a progressive increasing number of TDOC sentenced inmates. As of the date of this hearing, the county defendants housed a total of 147 TDOC sentenced inmates awaiting transport to TDOC facilities. Chief Kenneth Quindry testified that this

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time frame within which the State must remove these prisoners; rather, the court simply chose the proposal made by the state defendants.

number includes not only TDOC sentenced inmates but also inmates whose parole has been revoked. More importantly, Chief Quindry testified that if all of the TDOC inmate population would be below the TCI-rated capacity.

4. Commissioner Reynolds also testified that, prior to the earlier order of this court [see Doc. 145], the state defendants had taken no action to remove TDOC sentenced inmates from the Knox County facilities, despite the fact that the state defendants have been aware of the overcrowded conditions and attendant problems at the Knox County Jail. Commissioner Reynolds further testified that the county defendants have no legal means to unilaterally reduce the number of TDOC sentenced inmates in their custody.

5. The court finds, therefore, that the county defendants cannot alleviate the unconstitutionality overcrowded conditions at the Jail and the Intake Center without that State removing some of the TDOC sentenced inmates and parole violators from those facilities.

6. Since the entering of a federal court order by Judge Thomas A. Higgins in December, 1985 limiting the number of inmates who could be accommodated in the Tennessee State Prison System, Commissioner Reynolds testified that the state defendants have only added 300 beds to the total available bed space in the state correction system. In fact, there have only been 300 beds added since 1981. Furthermore, under the current building program of the state defendants, the State

of Tennessee at best will have a total deficit of over 1,000 beds, assuming that the total projected number of inmates required to be housed is correct. Commissioner Reynolds testified that, in other words, that State of Tennessee will always have "more prisoners than beds" under its current policy. The state defendants therefore plan to continue to house no less than 2,500 TDOC sentenced inmates in county jails at least until the early 1990's. [See Tr. Exh. 2]. In spite of this increasingly critical situation, Commissioner Reynolds testified that he was aware of no "emergency measures" being taken by the TDOC.

7. The state defendants' expert witness, Norman Cox, admitted in his deposition that the policy and practice of the State of Tennessee in allowing TDOC sentenced inmates to ";back up" and remain in local jails does not comport with good corrections policy. [See Doc. 153, pp. 106-07]. Cox did, however, opine that the practices and procedures established by the State of Tennessee and the TDOC since October, 1985 comport with good corrections policy; however, this opinion has been rendered without a review of the solutions and practices adopted by the State of Tennessee and did not include a review of current capacity needs versus projections of future capacity needs. [See id., p. 81; pp. 109-112]. Finally, Cox's testimony did not include any opinion as to the total projected needs of the State of Tennessee, nor was he able to render an opinion regarding whether the State of Tennessee's building program would be adequate in the future. [See id.

pp. 81-83].

8. All of the relevant evidence and credible testimony presented to the court at both hearings, i.e., during August, 1988 and March, 1989, clearly show that if all TDOC sentenced inmates and inmates whose parole has been revoked were removed from the Jail and the Intake Center, these two facilities would be within their TCI-rated capacity. This, in turn, would alleviate the unconstitutional conditions now existing in the Jail.

9. As a result of the backlog of the TDOC sentenced inmates in the Knox County Jail Facilities, and further as a result of the State program for payment to local jails for the housing of TDOC sentenced inmates, Harry Brooks, Administrative Assistant to the Sheriff, testified that the Knox County Sheriff's Department has experienced a shortfall in projected revenues of approximately $1,000,000.00 for fiscal year 1988-89. Because of this, the Knox County Sheriff's Department has reduced expenditures in other areas of the Department's budget, including expenditures in law enforcement and personnel. Brooks also testified that the Knox County Sheriff's Department has been paid an average of $13.91 per day by the State for housing state inmates during the first six months of the 1988-89 fiscal year. However, it presently costs Knox County $36.57 per day to house a prisoner.

Conclusions of Law

1. The court's conclusions of law issued in its Memorandum Opinion of

January 25, 1989 [see Doc. 132, pp. 35-61], are hereby adopted by reference. See Rule 10(c), Federal Rules of Civil Procedure.

2. The court concludes that the policy and practice of the state defendants in allowing TDOC sentenced inmates to remain in the Jail and the Intake Center for extended periods of time is the proximate cause of the unconstitutional condition prevailing at these facilities. Accordingly, the state defendants will be required to remove an additional number of TDOC sentenced inmates as set forth more specifically infra.

3. The court concludes that the only adequate and complete remedy available to resolve the unconstitutionality overcrowded conditions at the Jail and Intake Center is for the state defendants to remove from the custody of the county defendants such additional TDOC sentenced inmates until the overall inmate population is reduced to no more than the TCI rated capacity in both facilities. The TCI rated capacity for the Jail is 228 or less and the capacity for the Intake Center is 127 or less. Because the court has already ordered the state defendants to remove 80 TDOC sentenced inmates within 30 days from February 21, 1989, i.e., on or before March 23, 1989, the court will require that state defendants to remove the additional TDOC sentenced inmates or before May 30, 1989. For each additional TDOC sentenced inmate incarcerated in any of the Knox County jail facilities, the state defendants will have to

"simultaneously"[3] remove a TDOC sentenced inmate from the above facilities.

4. Although the court has imposed a limit on the number of inmates to be housed at each facility in accordance with the TCI rated capacity, the court recognizes that it will be necessary to occasionally house more inmates than the TCI rated capacity. Accordingly, the court will allow the Knox County jail facilities to exceed the TCI rated capacity by fifteen percent (15%), but only for no more than five (5) consecutive days or ten (10) days out of any thirty (30) days.

5. The drunk tank at either the Jail or the Intake Center shall not house more than sixteen (16) inmates at any one time

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[3]As discussed during trial on March 6, 1989, the word "simultaneously" as used both in this opinion and accompanying Order, as well as the Order entered on February 24, 1989 [see Doc. 145] shall be defined as follows: The Knox County Sheriff or his designee shall notify Howard Cook or his designee of the receipt any newly sentenced TDOC inmate as defined in this court's order of February 24, 1989 [see Doc. 145, p. 2]. Within three (3) working days following receipt of such notification, the state defendants shall remove from one of the Knox County jail facilities the TDOC sentenced inmate with the earliest sentenced effective date. The county defendants shall deliver said inmate to the physical custody of the state defendants.

and shall not house any inmate for more than forty-eight (48) hours. Furthermore, no inmate shall be housed in either drunk tank for more than two (2) days out of any thirty (30).

Epilogue

Finally, the court would note, as did the learned Judge R. Allan Edgar in Roberts v. Tennessee Department of Correction, Civ. 1-89-136 (E.D. Tenn., March 14, 1989), that the State "...has raised the specter of mass release of State prison inmates if it is required to take more than a certain number of TDOC sentenced inmates..." from Knox County Jail facilities. Id., slip op. at 18 This Court, like Judge Edgar, is convinced that the state defendants can and will find the means to manage its inmate population whereby a mass release of inmates will not be necessary. For example, Commissioner Reynolds testified that there were approximately 200 beds available across the state in county facilities in which TDOC sentenced inmates could be housed. Nevertheless, the court believes that the state defendants have interjected this alleged state wide issue of "mass release of inmates" in an attempt to have this court make a declaratory judgment on an issue that is purely one of state concern and one that is not, therefore, a federally justiciable issue. A federal court of this district or of any district should not be confronted with the impossible task of solving the overcrowded condition of the prisons and jails of the entire state. This is the State's responsibility. All this court can and

should do in this particular case is to order the State to remove its inmates from the Knox County jail facilities to eliminate the unconstitutionally overcrowded condition here. Thus, if the State sees fit to release these prisoners because it cannot constitutionally accommodate them ,this will be the State's decision - it will not be the decision of this court. State officials must answer to the minimum constitutional requirements of penal incarceration, and the state defendants must further answer to the people of this state if they fail in this duty. Moreover, the State must answer to the people if it chooses to turn criminals out of prison before they have paid the penalties imposed upon them by law.

Furthermore, the United States District Court in Nashville has seen fit to supervise the operations of the state-owned and operated prisons particularly with reference to prison population capacities. This case involves only the conditions existing in the Knox County jail facilities. It would amount to sheer folly to transfer every case of this nature to a judge in Nashville, just because state prisoners are involved. Such a move would not solve the problem, but only delay justice. To say that the venue of such a case as this and others like it should go to one judge 200 miles away so as to avoid inconsistency in the handling of state prisoners misses the point. The point is and should be that certain prisoners in the Knox County Jail are entitled to relief now. The Sheriff of Knox County is entitled to relief from this liability now. Moving this case will

not change the facts. It will only cause undue delay. While the state needs and wants a delay, it can be readily seen from the history of lack of planning and construction of prisons over the last ten years that the state has received more delay than it is entitled to. The system has apparently now reached its day of reckoning, and this is not the fault of the Federal Judiciary.

ORDER ACCORDINGLY.

JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

January 11, 1990

R. Murray Hawkins
Eastern District of Tennessee at Knoxville
P.O. Box 2348
Knoxville, TN 37901

Re: 89-5341/5369
Carver vs. Knox County
District Court No. 86-00299

Dear Counsel:

Enclosed please find:

The mandate issued in the above-styled case.
The Court's per curiam opinion.

Please be advised that the certified record was never sent to this Court on appeal.

Very truly yours,

Leonard Green, Clerk

(Ms.) Cheryl Borkowski
Deputy Clerk

cc: Kimbra R. Spann John Eldridge
David M. Himmelreich
Charles W. Burson
John C. Duffy
Richard T. Beeler
Robert H. Watson, Jr.
Dale C. Workman
Dean Rivkin

RAY, FARMER & ELDRIDGE
Attorneys at Law
(Letterhead)

September 1, 1989

CONFIDENTIAL

The Honorable Gilbert S. Merritt
The Honorable David A. Nelson
The Honorable Pierce Lively
Judges of the United States Court of Appeals
for the Sixth Circuit
United States Post Office Building
Fifth and Walnut Streets
Cincinnati, Ohio 45202

Re: Carver v. Knox County v. McWherter
Nos. 89-5341, 89-5369, 89-5556.

Dear Judges Merritt, Nelson, and Lively:

Pursuant to Rule 18 of this Court and F.R.A.P. 33, counsel in the Carver case have participated in the mediation process suggested by the Court in its Order of July 11, 1989. As a result of that process, the parties in Roberts v. Tennessee Department of Correction, et al., have submitted to the Court a proposed comprehensive scheme to address the issues identified by the Court in its July 11 Order. This letter will report the results of that process between the class of inmate Plaintiffs and the State of Tennessee.

Both the class of inmate Plaintiffs

and the State support the provisions of the scheme in the Roberts Rule 18 proposal. In the Carver (Knox County) case, if at least the following provisions of the Roberts Rule 18 proposal are adopted and implemented by the Court, counsel for the inmate Plaintiffs are satisfied that their clients will have obtained appropriate relief on these issues:

1. The removal by the State of a certain number of TDOC Inmates from the Knox County Jail facilities by September 25, 1989.

2. The removal by the State of an additional number of TDOC inmates from the Knox County Jail facilities between the opening date of the River Bend Maximum Security Prison and December 1, 1989.

3. Confirmation in writing of the number of inmates to be removed by the State as outlined in Paragraphs (1) and (2) above through the Senior Conference Attorney of the Sixth Circuit.

4. The inclusion of counsel for the Knox County Inmate Plaintiffs as full participants

in the proposed Implementation Coordinating Committee (ICC).

5.The manner of removal of TDOC-sentenced inmates from the Knox County Jail as outlined in II D of the proposed Roberts agreement.

6.The appointment of the proposed Consultant for Local Corrections (CLC) by the Judge of the Middle District of Tennessee to whom Grubbs is assigned.

7.The imposition by December 1, 1989, of a population limit on the number of inmates who can be incarcerated in each of the Knox County Jail facilities.

8.The imposition by December 1, 1989, of a population limit on the number of TDOC-sentenced inmates who can be incarcerated in the facilities at the Knox County Jail.

9.The jurisdiction of the non-population, inmate-related issues shall not be transferred, but shall remain with Eastern District (Judge Jarvis).

Having similarly participated in the mediation process, the State of Tennessee agrees to dismiss its appeal of the confinement in the Knox County Jail facilities to be unconstitutional, if the

Roberts Rule 18 proposal is similarly applied to the Knox County case as part of a comprehensive scheme to address these issues statewide. Further, upon the Plaintiff inmates' agreement not to continue their opposition to the change of venue and relief issues raised by the State on this appeal, the State agrees to recognize that the inmate Plaintiff's are prevailing parties in this case for the purpose of 42 USC Section 1988.

Respectfully Submitted,

Knox County Jail Inmate Attorneys

John E. Eldridge

Dean Hill Rivkin

Office of the Attorney General
and Reporter of the State of
Tennessee

By:
David Himmelreich
Special Counsel Division

xc: Richard Beeler, Attorney
for Knox County

(Letterhead)
Office of the Conference Attorneys
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

September 1, 1989

Honorable Peirce Lively
Senior Circuit Judge
U.S. Court of Appeals
For the Sixth Circuit
P.O. Box 1226
Danville, KY 40422

RE: Carver v. Knox County v. McWherter, et al
CA Nos. 89-5341/5369

Roberts v. Tennessee Dept. of Corrections;CA No. 89-5307

Dear Judge Lively:

On July 11, 1989, the Court entered an order inviting the parties in this litigation to enter into negotiations under Rule 18 for the purpose of designing a state-wide solution to the problem of jail and prison overcrowding in the State of Tennessee. As reported previously, counsel for all parties agreed to talk and have been meeting intensively by phone and in person since the date the order was entered. After these extensive negotiations, a proposed settlement could only be reached in the Roberts case, CA No. 89-5307. Plaintiff inmates and the State of Tennessee have reached agreement on issues between them in the Carver case which they are reporting to the Court separately.

On behalf of the parties to the Roberts appeal, I am forwarding their agreement which does set forth a comprehensive approach to remedying the jail overcrowding problems in the State of Tennessee. Pursuant to the Roberts agreement, all of the specified relief will be provided to Knox County and the Plaintiff inmates incarcerated in Knox County even though they are not signatories to the agreement.

There are several objectives of this agreement which meet the perceived needs of these parties:

1.To provide immediate relief from extreme overcrowding conditions in the Knox and Hamilton County jails and to provide a process for quick relief from extreme overcrowding conditions in other county jails that come to the attention of the courts.

2.To coordinate the assumption of responsibility by the State of Tennessee for TDOC inmates with the restrictions imposed upon the State by the Court orders in the Grubbs case.

3.To establish a process for setting priorities for the allocation of finite state and local correctional resources -- particularly the allocation of state prison bed space among the competing and pressing demands of local jails for relief.

4.To establish procedures for limiting total jail populations and assisting local officials in meeting those local jail population limits.

5.To accomplish all of the above with a minimal amount of judicial intrusion and maximum clarity for all of the parties concerned.

One feature of this agreement is the suggestion that the Sixth Circuit Court retain sufficient jurisdiction over the cases for several months that compliance with promised but unspecified immediate relief can be assured. To that end, the State of Tennessee has submitted to this office specific commitments for relief over the next several months and would authorize this office to communicate to the Court if every good faith effort is not made to implement that relief. This unusual approach was deemed necessary by the parties to this agreement in order to accommodate the State's concern that public commitments of specific relief to the two counties in this litigation would immediately spur litigation by other counties. My hope and expectation is that this "immediate relief" phase of the agreement will be completed by the first of the year without incident.

The main feature of the agreement involves referral of the population issues in this and future litigation to Judge Higgins in the Middle District of

Tennessee. The linchpin of this agreement, beyond the immediate relief phase which ends December 1, is the appointment of a "local corrections consultant." The parties propose to recommend three corrections experts, one of whom would be appointed by Judge Higgins as a special master. The consultant will review the jail population problems in affected counties and recommend limits on both the number of TDOC prisoners who may be kept in that county and also on the total number of prisoners that my be kept in those local county jails. The consultant will consider the nature and needs of that jail's population, alternatives available to the local officials for managing and reducing the local inmate population as well as alternatives available to the state to take more of its prisoners out of the local jails. As proposed, this consultant would report recommendations to Judge Higgins after review by an ongoing "implementation coordinating committee" composed of representative for all of the affected parties. Ideally, following this review process, recommendations will go to Judge Higgins without objection. At the time of this writing, the parties have not agreed on who should bear the costs for the corrections consultant and ask this Court to decide that question.

The parties in Roberts propose that the Court in the Middle District of Tennessee be given the unique responsibility for ordering these population caps and reconciling any conflicts that might arise between the local jail population recommendations and

the orders already entered in the Grubbs case. This Court is asked to require any district court, upon entry of findings of local jail overcrowding caused in part by the presence of state prisoners, to transfer such portions of that case to Judge Higgins as necessary to enable him to immediately implement the cap-setting procedure. All other issues concerning jail conditions would be left with originating district court for decisions and remedial orders. Challenges to, and motions to amend or enforce population caps would be filed and heard in the Middle District of Tennessee.

The form of this agreement is a proposed order which might be more appropriate for a consent order in a district court that for a court of appeals. When we first began these discussions it was thought that an order from this Court establishing a procedure might be the best approach to the problem and so the group's thinking and negotiations about this procedure has developed along these lines. Since this agreement is not a consent order per se, all of the parties recognize that the Court undoubtedly will draft its decision and orders as it sees fit. A memorandum from the State Attorney General's Office is enclosed offering authority in support of this agreement.

Sincerely,

Robert W. Rack, Jr.

cc: counsel for all parties

Law Offices

WATSON, REEVES & BEELER
(Letterhead)

February 23, 1990

Mr. Robert W. Rack, Jr.
Senior Conference Attorney
United State Court of Appeals
for the 6th Circuit
U.S. Post Office and Court House
Cincinnati, OH 45202-3988

RE: Proposed transmittal letter in
Carver vs Knox County v. McWherter, et al
CA No. 89-5341/5369

Dear Mr. Rack:

We are in receipt of a facsimile copy of your proposed draft of a transmittal letter to the Judges of the Panel hearing the above case. On behalf of Knox County, we must respectfully object to your disclosure to the Panel that Knox County is the party in the Carver cases which cannot agree to the settlement proposal made by the State of Tennessee. Sixth Circuit Rule 18 (c) (4) provides in pertinent part: "The statements and comments made during the pre-argument conference are confidential, except to the extent disclosed by the pre-argument conference order entered pursuant to Rule 18 (d), and shall not be disclosed by the Conference Judge or Conference Attorney nor by counsel in briefs or argument." (emphasis added). It is Knox County's position that the disclosures made in your proposed draft letter regarding Knox

County's position in the settlement negotiations violates the spirit if not the letter of Sixth Circuit Rule 18. Further, it is Knox County's position that the proposed draft potentially prejudices Knox County by disclosing that, despite good faith efforts at negotiations, it was the party that could not agree to nonjudicial resolution of the dispute.

This same objection must apply with equal force to any suggestion to the Panel that the class of Knox County inmates supports the Roberts proposal or that the process "meets their needs." It necessarily follows from such a disclosure that Knox County is the only party exercising it's right to have a decision on the merits by the Court. Although the Panel might be keenly interested in such information, it is Knox County's position that such a disclosure is impermissible under Rule 18 as well as settled law on nondisclosure of settlement negotiations.

Further, there are numerous other provisions of the proposed draft which Knox County feels don not preserve it's right to have the case decided objectively on the merits by the Court. Knox County particularly objects to the draft's suggestion that the parties, other than the State, request the Court to order that all future cases in which the State is found responsible for overcrowding conditions in County jails be incorporated into the process proposed for the Roberts case.

Last, we do not understand why it is necessary to include in your transmittal letter any digested interpretation of the proposed Roberts Order nor the parties' wishes, purposes, or reasons behind particular provision of the agreement. The Order would seem to speak for itself.

To this end, I have attached two proposed revisions to the draft of the transmittal letter which Knox County feels eliminates the above mentioned objectionable and/or prejudicial revelations to the Panel. Version 1 is our preferred version. It omits any interpretation or capsulation of the Roberts agreement. Version 2 deletes and revises the proposed draft only to the extent we feel it prejudices Knox county's rights to a decision on the merits by the Court. The changes in the first version are self evident. More isolated changes in the second version are in bold type.

Let me emphasize that, while Knox County has appreciated your and Deborah Ginocchio's efforts at resolving these incredibly complex cases, we believe that revelations to a Panel of the positions of the parties in negotiations will inevitably thwart both the provisions and purposes of Rule 18.

Very truly yours,
Robert H. Watson, Jr.
Richard T. Beeler
John C. Duffy

cc: Charles Burson Michael J. Mahn
Dean Rivkin
John Eldridge

NO. 99-5307

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE DEPARTMENT OF CORRECTIONS, COMMISSIONER JEFF REYNOLDS, AND STATE ATTORNEY FEDERAL CHARLES BURSON,

APPELLANTS, ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

V.

DALTON ROBERTS, FLOYD FULLER AND H.Q. EVATT,

APPELLEES.

Before: MERRITT, Circuit Judge

RULING FROM THE BENCH ON MARCH 16, 1989.

The Court will rule on this emergency request for a stay. I have read Judge Edgar's opinion, I have listened to counsel. For those who do not understand what this process is, the only question before the court under the Fed. Rules of Civil and Appellate Procedure is the question of whether this court will enter a stay, that is to say, temporarily hold in abeyance the injunctive order entered by Judge Edgar recently and on which yesterday he denied a stay at the behest of the state and declined to hold his injunctive order in abeyance during the pendency of the appeal.

First, it will most likely take the Sixth Circuit Court of Appeals 60 to 90 days to decide this case assuming an expedited briefing schedule and assuming an expedited hearing

It is the function of the Court of Appeals to coordinate and review the work of the federal district courts. In my view we should not have five or six different federal district judges ordering the state prison system to do potentially conflicting acts when we have one main prison case pending, a case in Nashville in which orders have been entered. As our court has previously said in that case when we ordered a consolidation in a similar situation of two prison cases, we need to have one cook in the kitchen, not several with conflicting recipes. So the stay will be entered and the clerk will be requested to set this case on an expedited basis in the Court of Appeals and I will request the clerk to set it by May 15, 1989, if the parties can get everything filed by that time. If you want more time, you can let me know in just a minute.

On the question of remedy and irreparable harm, let me make this observation which may or may not be helpful. It is not the function of the federal courts to run the state penal system, but it is our function to determine whether the system is so bad that it violates the federal Constitution. And we have determined previously that Tennessee's system is unconstitutional in certain respects and that a remedy must be found. Now after many years of neglect

and inaction, it does appear, that Governor McWherter is hard at work on a solution. He has appeared before Judge Higgins and apparently a diligent effort is underway to work out a comprehensive panel plan. In some respects the Legislature and the local officials are working at cross purposes with the Governor, and that process needs to be guided. They may make the job of the Governor much more difficult in this kind of situation. More and more petty offenders, perhaps not in Hamilton County, but across the state, are going to jail to take cells and beds from hardened criminals and that seems to be a fact. The relentless prosecution of first offender DUI cases is a good example. Tennessee apparently has the most severe and most oppressive DUI law of any state in the nation. Thousands of first offenders in DUI cases are taking up jail space every month. Another example is the way the state penal system treats indigent or poor petty offenders. There may not be a conspiracy, but the effect may be the same -- to put money in the pockets of the bondsmen at the expense of the taxpayers. There are thousands of poor people in jails awaiting trial for petty offenses, people who have not been convicted. They are in jail because they cannot make a $500 or $1,000 or a $3,000 bond that perhaps never should have been required. The system, which has the effect of enriching bondsmen at the expense of the poor and the taxpayers, has been in existence a long time. It was in existence when I came to the bar 30 years ago. It was in existence when my great-grandfather came to the bar 150 years age.

And perhaps now with this overcrowding problem it is time to correct that system...

Supreme Court, U.S.
FILED
APR 9 1990
JOSEPH F. SAPNIOL, JR.
CLERK

No. 89-1440

In The

Supreme Court of the United States

October Term, 1989

KNOX COUNTY, TENNESSEE, AND
JOE FOWLER IN HIS OFFICIAL CAPACITY
AS SHERIFF OF KNOX COUNTY, TENNESSEE,

Petitioners,

v.

NED R. McWHERTER,
GOVERNOR OF THE STATE OF TENNESSEE, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Does the transfer of the overcrowding claim in a local jail conditions case by the Sixth Circuit from one district court to another district court which has jurisdiction over a state prison conditions case, where there are potentially conflicting remedies imposed by the district courts, for the purpose of insuring consistent remedies in both cases contravene any public policy?

2. Whether a remedial process requiring the severance and transfer of claims against state officials in a local jail conditions action to one district court presiding over state wide prison conditions litigation is consistent with decisions of this court and other courts of appeals?

3. Is the issue of whether the actions of state officials in limiting acceptance of the number of inmates sentenced to the Tennessee Department of Correction awaiting transfer in a local jail constituted the proximate cause of the unconstitutional conditions in that local facility a question of law subject to full judicial review by the Sixth Circuit or a question of fact limited to review of the record and the clearly erroneous rule?

4. Did members of the Sixth Circuit panel violate Rule 18 of the Rules of the Sixth Circuit regarding settlement conferences by holding a hearing on the proposed settlement between the original plaintiffs and state defendants when the opinions in both cases had already been drafted and the petitioners themselves advised the court of their objections to the proposed settlement?

QUESTIONS FOR REVIEW – Continued

5. Whether the severance and transfer of claims pursuant to 28 U.S.C. § 1404 against state officials in a local jail conditions action conflicts with decisions of this court and other courts of appeals?

PARTIES TO THE PROCEEDINGS BELOW

The original plaintiff in this action, Wayne Dillard Carver, who is not a petitioner before this Court, is the class representative of all persons who have been or are confined in the Knox County, Tennessee, jail facilities.

The petitioners in this case are Knox County, Tennessee, and Joe Fowler, Sheriff of Knox County, Tennessee, in his official capacity. The petitioners are the original defendants and cross-plaintiffs in this case.

Finally, the respondents in this case are Ned R. McWherter, Governor of the State of Tennessee, W. Jeff Reynolds, Commissioner of Correction of the State of Tennessee, and Deborah Miller, Executive Director of the Tennessee Parole Board, in their official capacities. The respondents are cross-defendants in this case.

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No. 89-1440

In The

Supreme Court of the United States

October Term, 1989

KNOX COUNTY, TENNESSEE, AND
JOE FOWLER IN HIS OFFICIAL CAPACITY
AS SHERIFF OF KNOX COUNTY, TENNESSEE,

Petitioners,

v.

NED R. McWHERTER,
GOVERNOR OF THE STATE OF TENNESSEE, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals of the Sixth Circuit dated October 6, 1989. That opinion is reported as *Carver v. Knox County,* 887 F.2d 1287 (6th Cir. 1989).

STATEMENT OF THE CASE

The instant petition arises out of an action challenging conditions of confinement in the penal facilities of

Knox County, Tennessee. The petitioners are appealing the decision of the Sixth Circuit to sever and transfer all claims against the respondents from the United States District Court for the Eastern District of Tennessee to the United States District Court for the Middle District of Tennessee pursuant to Rule 53, Fed. R. Civ. P. and 28 U.S.C. § 1404(a). In order to understand the dimensions of this case, a short history of other related prison conditions litigation is important.

Since the 1970s, the State of Tennessee ("State") has been engaged in litigation over conditions in its prison system. In *Grubbs v. Bradley*, 552 F. Supp. 1052 (M. D. Tenn. 1982), and in subsequent proceedings in that same case, the district court ("*Grubbs* Court") placed a capacity limit on the number of prisoners that the State could place in its various facilities.

In 1985, State and some local facilities were seriously crowded. Because of this serious crowding which was occurring in state institutions, the *Grubbs* Court ordered the State not to accept Tennessee Department of Correction ("TDOC") sentenced prisoners into the State system unless there was space available. *See Grubbs v. Norris*, Order, October 23, 1985 (Appendix, App. 4-App. 6). In order to comply with these capacity limits, the state slowed its intake of prisoners. Overcrowding in state facilities was thus eliminated, but the number of TDOC-sentenced prisoners held in local jails began to increase.

In *Roberts v. Tennessee Department of Correction*, 887 F.2d 1281 (6th Cir. 1989), the Sixth Circuit resolved conditions litigation between county and State officials and

entered an order on October 5, 1989 approving a settlement agreement between the parties. The agreement provided for a statewide system of relief from local jail overcrowding that could be coordinated with the state prison population orders currently supervised by the *Grubbs* Court. The court held that the remedial portions of the case before it that pertained to limits on inmate populations would be transferred on remand with instructions to the *Grubbs* Court. The Sixth Circuit recommended that the remedial process established by its order be used in all future litigation in which the presence of TDOC-sentenced prisoners is alleged to be causing unconstitutional conditions. *Roberts*, 887 F.2d at 1283. This remedial process requiring the severance and transfer of TDOC-population capacity issues is referred to as the "*Roberts* process". *Id.*

On October 6, 1989, the Sixth Circuit also decided *Carver v. Knox County, Tennessee*, 887 F.2d 1287 (6th Cir. 1989), which is the instant action. In *Carver* the Sixth Circuit held that claims against the respondents would be transferred to the *Grubbs* Court, and that the district court below was to require petitioners to take appropriate and necessary remedial steps to eliminate "uniquely local" unconstitutional conditions of confinement. The Sixth Circuit denied petitioners' request for rehearing *en banc* on December 29, 1989. It is from this judgment that petition for writ of certiorari was filed with this Court.

STATUTORY PROVISION INVOLVED

The following statutory provision is relevant to this case and set forth as follows:

28 U.S.C. § 1404(a):

> For the convenience of parties and witnesses, and the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE FIRST, THIRD AND FOURTH ISSUES, WHICH PRESENT QUESTIONS OF THE PROCEDURE IN TRANSFERRING CASES FROM ONE DISTRICT COURT TO ANOTHER AND THE INTERNAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, ARE NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT.

The first, third, and fourth issues presented by the petitioners do not assert that the Sixth Circuit's decision is inconsistent with any decision of this Court or any other circuit. *See* Rule 17.1(a), Rules of the Supreme Court. On the other hand, the petitioners assert that the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." *Id.*

These issues concern: (1) the action of a federal appellate court in transferring a claim under 28 U.S.C. § 1404(a) regarding overcrowding in a local jail from one

district court to another in which there is a state prisons condition case; (2) the standard of review as to whether the action of state officials in limiting the number of inmates scheduled to be transferred from a local jail to a state correctional system is the proximate cause of unconstitutional conditions in that local jail; and (3) interpretation of the internal rules of the Sixth Circuit regarding settlement conferences. It is the position of the respondents that none of these issues rise to the level which would justify review by this Court.

In the first issue, the petitioners complain that the Sixth Circuit is allowing the Knox County Jail to remain in an unconstitutional condition vis-a-vis overcrowding by allowing state officials to limit the number of inmates sentenced to the TDOC who are awaiting transfer in the Knox County Jail to be transferred to a state correctional facility. Petition for Writ of Certiorari, pp. 10-11. This conclusion is based upon the Sixth Circuit's decision to transfer the overcrowding claim in this case from the district court in Knoxville, Tennessee, to the district court in Nashville, Tennessee, which also has jurisdiction over a state prison conditions case which has been ongoing for a number of years. *Grubbs v. Norris*, 870 F.2d 343 (6th Cir. 1989). This action by the Sixth Circuit, according to the petitioners, "contravenes important public policy and mandates correction by this Court." Petition for Writ of Certiorari, p. 12.

Beyond the fact that the petitioners fail to cite any provision of the United States Constitution which they claim is violated or even any case law to support their "public policy" argument, their basic contention is erroneous. Prior to the filing of the original action by inmates

in the Knox County Jail against the petitioners and the subsequent third-party claim by the petitioners against state officials, there has been an ongoing suit in district court in Nashville, Tennessee, regarding the conditions of state correctional facilities including the issue of the overall inmate population in the system. *Grubbs, supra.* In 1985, the district court in Nashville imposed a population limitation on the state system and ordered state officials to not receive any more inmates in excess of that limit. See *Grubbs v. Norris*, Order, October 23, 1985 (Appendix, App. 1-App. 3). Subsequent to that order, the prisoner population in the Knox County Jail increased above the rated capacity, and suit was filed in district court in Knoxville by inmates against the petitioners. After the respondents were made third-party defendants in this action, the district court ordered the respondents to accept 80 inmates from the Knox County Jail within 30 days. *Carver v. Knox County*, 887 F.2d at 1289.

During this litigation, the respondents filed a motion to transfer this case to district court in Nashville so that a single district judge could provide consistent remedies in both cases. The district court in Knoxville, Tennessee, denied that motion; however, the Sixth Circuit granted the transfer, stating the following:

> This case requires us to exercise our supervisory authority over the district courts. Otherwise, the federal courts will have created an intolerable situation for the state of Tennessee contrary to the principles of comity and federalism. In effect, this action and a similar one in the Eastern District of Tennessee – *Roberts v. Reynolds* – are

> disputes between counties in the state of Tennessee rather than disputes between inmates and their custodians. We neither overlook nor excuse the fact that the state has permitted unconstitutional conditions to exist within its prison facilities. That fact was established in *Grubbs*. However, the only common sense approach to solving the statewide problem is to ensure that the authority commanding changes that will produce a constitutionally satisfactory system speaks with a single voice.

Carver v. Knox County, 887 F.2d at 1293. Contrary to the assertions of the petitioners, the action of the Sixth Circuit was not against any "public policy" but was a reasonable solution to an otherwise difficult problem.

The third issue concerns whether the actions of the state defendants in not accepting inmates from the Knox County Jail due to the population limitation order in *Grubbs* constituted the proximate cause of the unconstitutional conditions in the Knox County facility. The petitioners complain that the Sixth Circuit failed to "review and rely on the transcript of the proceedings in the District Court with the panel's consideration of facts not contained in the record constitute[d] such a departure from appropriate appellate review as to require this Court to exercise its supervisory powers by granting certiorari review." Petition for Writ of Certiorari, p. 17. The petitioners, in essence, seek to involve this Court in a review of the record in this case as to the facts surrounding the "proximate cause" issue.

It is well established by this Court that it will "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

See also Texas v. Mead, 465 U.S. 1041 (1984). The question of what facts the Sixth Circuit should or should not have reviewed in the record is not an issue of sufficient importance to justify review by this Court.

More importantly, the question of proximate cause in this instance is not, contrary to the assertions of the petitioners, a finding of fact. Rather, it is a conclusion of law. The Sixth Circuit expressly affirmed the district court's findings of historical facts. *Carver v. Knox County*, 887 F.2d at 1293. What the panel rejected was the district court's "conclusion that all of the impermissible conditions it found present in the Knox County facilities are the direct result of the presence of TDOC-sentenced inmates." *Id.* To say that this conclusion is "not supported by the record" is to reach a legal conclusion not requiring invocation of the clearly erroneous rule.

The fourth issue concerns the petitioners' assertion that the Sixth Circuit should not have decided this case after being apprised that the petitioners were the parties who were unable to agree to settlement in this case. In particular, the petitioners cite Rule 18 of the Rules of the Sixth Circuit which provide in part the following:

> (c)(3) A judge who participates in a pre-argument conference or becomes involved in settlement discussions pursuant to this rule will not sit on a judicial panel that considers any aspect of the case except their participation in a pre-argument conference shall not preclude a judge from participating in any *en banc* consideration of the case.
>
> (c)(4) The statements and comments made during the pre-argument conference are confidential, except to the extent disclosed by the pre-

> argument conference order pursuant to Rule 18(d) and shall not be disclosed by the conference judge or conference attorney nor by counsel in briefs or arguments.

It is the position of the respondents that the interpretation of an internal rule of a federal appellate court is not a question which justifies review by this Court. The petitioners raised their concerns regarding this issue in their Petition for Rehearing *En Banc* before the Sixth Circuit. That petition for rehearing was denied. The issue of the interpretation of an internal rule of a federal appellate court is not one which justifies review by this Court. In any event, the very facts complained of by the petitioners were disclosed by petitioners' counsel at a hearing held in open court before the Sixth Circuit.

II.

THE DECISION OF THE SIXTH CIRCUIT TO TRANSFER THE OVERCROWDING CLAIM IN A LOCAL JAIL CONDITIONS CASE FROM ONE DISTRICT COURT TO ANOTHER DISTRICT COURT IN WHICH THERE IS A STATE PRISON CONDITIONS CASE IN ORDER TO PROVIDE CONSISTENT REMEDIES DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER CIRCUIT.

The second and fifth issues presented by the petitioners assert that the Sixth Circuit's decision is inconsistent with decisions of this Court and other circuits. Rule 17.1(a), Rules of the Supreme Court.

As for the second issue, the petitioners' reliance on *Benjamin v. Malcolm*, 803 F.2d 46 (2nd Cir. 1986), is misplaced. In that case, the city defendants sought joinder of

state defendants as a party in a federal civil rights action by detainees. The state refused to promptly receive state-ready prisoners. This refusal directly injured the city in that the city face contempt sanctions for failure to comply with a court order requiring the city to remedy over-crowded conditions at its detention center.

Unlike *Benjamin*, however, the petitioners are not facing any contempt sanctions for failure to comply with a court Order requiring petitioners to meet a total facility population cap at its confinement facilities.

In the instant action, the petitioners are required only to provide a status report to the court setting forth all efforts which have been undertaken by petitioners to remedy "uniquely local" constitutional violations. *See Carver v. Knox County,* Order, March 19, 1990, the court's Order does not require the petitioners to either slow or discontinue its intake of confinees.

The petitioners also contend that under *Tate v. Frey,* 735 F.2d 986 (6th Cir. 1984), the Sixth Circuit, by establishing the *Roberts* process, failed to follow its own precedent. Beyond the fact that an intra-circuit conflict is not a basis for review by this Court, the Sixth Circuit did indeed follow its own precedent. In *Tate,* the court held that the federal district court could grant a preliminary injunction against state officials upon constitutional grounds, with respect to a conditions of confinement action involving a local jail.

Here, the *Grubbs* Court enjoined respondents from accepting TDOC-sentenced prisoners into the State

system unless there was space available. Further, the *Roberts* process is the result of the parties, to a confinement conditions action, negotiating a program calculated to reduce the overcrowding and attendant unconstitutional conditions existing at a local confinement facility. Finally, the venue issue was not raised in either *Benjamin* or *Tate*.

Thus, the *Roberts* process does not divest federal district courts of jurisdiction to preside over local confinement conditions litigation. *Carver v. Knox County*, 887 F.2d at 1294, 1295. Nor will the process act as a bar to litigants seeking redress for alleged constitutional violations of local confinement. *Id*.

As for the fifth issue, the Sixth circuit's severance and transfer of injunctive relief claims against respondents pursuant to 28 U.S.C. § 1404(a) is consistent with federal statutory and constitutional law. There is support for the *Roberts* process among Courts of Appeals. *See generally In re Clements*, 881 F.2d 145, 153 (5th Cir. 1989) (transfer of remedial portion of action dealing with the removal of state sentenced prisoners to the district court presiding over the litigation of a state wide prison conditions case); *Hamilton v. Morial*, 664 F.2d 351, 353 (5th Cir. 1981) (issued writ of mandamus requiring transfer of all actions concerning overcrowding in state and local confinement facilities).

At all times relevant to the instant action, the respondents resided in the Middle District of Tennessee where the State capital is located. Venue is proper because the original plaintiffs filed an amended complaint, naming as defendants the respondents who were first brought into the action by the petitioners' third party complaint.

This Court's decision in *Hoffman v. Blanski*, 363 U.S. 335 (1960), was met here by the filing of the third party and amended complaints against the respondents, that is, the Governor and other State officials. That case, which is cited by petitioners, did not concern a third party action and amended complaint against a new set of defendants located in a different district. On the contrary, *Hoffman* concerns two party lawsuits in which each party conceded "that statutory venue did not exist over either of these actions in the respective transferee districts". *Id.* at 340-41. No such concession was made in the case decided by the Sixth Circuit here. In the instant action, the original plaintiffs brought a lawsuit against the parties residing in two different districts within the State. Thus, the Sixth Circuit's decision does not conflict with *Hoffman*.

CONCLUSION

The petitioners have failed to provide any reasons for this Court to grant the petition for writ of certiorari. No decisions of other federal circuit courts or this Court conflict with the decision of the Sixth Circuit. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

JOHN KNOX WALKUP
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MICHAEL W. CATALANO
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SCOTTY GRUBBS, et al,	)	
Plaintiffs,	)	CIVIL NOS.
	)	80-3404 80-3518
vs.	)	80-3616 80-3617
STEPHEN H. NORRIS, et al,	)	JUDGE HIGGINS
	)	
Defendants.	)	

ORDER RESTRICTING ADMISSIONS
TO RECEPTION CENTERS

(Filed OCT 23, 1985)

For the reasons stated on the record by the court at the hearing of this case on October 23, 1985, which shall constitute the findings of fact and conclusions of law of the Court, the plaintiffs' Motion for Further Relief (filed October 2, 1985) is granted to the extent and with the exceptions set out below.

1) Effective 8:30 p.m., Central Daylight Time, October 23, 1985, the defendants are precluded from admitting any new or additional inmates into the prison system's "Reception Centers" (West Tennessee Reception Center, located in Shelby County, Tennessee; Middle Tennessee Reception Center, located in Davidson County, Tennessee; and East Tennessee Reception Center, located in Morgan County, Tennessee) until the population at one or more Reception Center is reduced to or below the "designated capacity" given for that prison in this Court's order of

October 18, 1983, as modified by this Court's Order of December 15, 1983.[1]

2) At such time as any Reception Center houses fewer inmates than its designated capacity, new or additional inmates may be admitted to that (or those) Reception Centers. Provided, however, that at no time may any Reception Center admit inmates if it is at or above its designated capacity, except as noted below.

3) The Commissioner of Correction may personally certify to the Special Master that urgent security reasons require the admission of an inmate to a reception center (or other prison facility) that is at or above its designated capacity. This certification, which shall be promptly reported to the Special Master, shall be sufficient to allow the admission of the inmate in question to a reception center (or other prison facility), other provisions of this Order to the contrary notwithstanding.

4) In other cases, if reasons of the safety of inmates, law enforcement personnel, or the public appear to necessitate the incarceration of an inmate in the state prison system, those reasons shall be communicated from the Commissioner of Correction, or his designee, to the Special Master for his prompt review and disposition. If the Special Master finds the reasons stated appear to necessitate the incarceration of the inmate in question in the state prison system, he may allow the admission of the

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[1] As stated in that Order, the designated capacities are: WTRC (not including beds in the "Annex," formerly known as Memphis Community Service Center) – 291; MTRC – 600; ETRC (excluding any housing in the minimum security "Red and White Buildings") – 313.

inmate into a reception enter (or other prison facility) that is at or above its designated capacity.

5) The parties and Special Master are directed to develope such procedures as are necessary to effectuate the provisions of this Order.

6) All other Orders previously entered in this case, except to the extent modified previously or by this Order, shall remain in full force and effect. This Court's Order of June 27, 1985, shall expressly continue in full force and effect.

ENTER this the 25th day of October, 1985.

/s/ Thomas A. Higgins
THOMAS A. HIGGINS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

WAYNE DILLARD CARVER, *et al.*,	)	
	)	
Plaintiffs	)	Civ. 3-86-299
	)	
v.	)	
	)	
KNOX COUNTY, *et al.*,	)	
	)	
Defendants	)	

ORDER

(Filed March 19, 1990)

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, the court hereby GRANTS plaintiffs' request for relief contained in their amended complaint to the extent that the court DECLARES as follows:

I. That the following conditions of confinement are unconstitutional as applied to both the pretrial detainees and the Tennessee Department of Correction ("TDOC") – sentenced inmates:

A. The overcrowded conditions;

B. The level of violence (in the drunk tank only);

C. The lack of a meaningful classification system;

D. The lack of basic necessities;

E. The lack of sanitation (in the drunk tank only);

F. The lack of meaningful indoor exercise and the lack of outdoor exercise if confined for more than one year;

G. The lack of adequate medical screening at the time of initial incarceration;

H. The lack of adequate dental care; and

I. The lack of meaningful access to the courts.

II. That the following conditions of confinement at the Knox County Jail Intake Center are unconstitutional as applied to both pretrial detainees and TDOC-sentenced inmates:

A. The overcrowded conditions;

B. The level of violence (in the drunk tank only);

C. The lack of a meaningful classification system;

D. The lack of basic necessities;

E. The lack of sanitation (in the drunk tank only);

F. An inadequate ventilation system;

G. The lack of meaningful indoor exercise and the lack of outdoor exercise if confined for more than one year; and

H. The lack of adequate medical screening at the time of initial incarceration.

III. That there presently exist no conditions of confinement at the Knox County Jail Annex which are unconstitutional as applied to either the pretrial detainees or the TDOC-sentenced inmates.

The county defendants are hereby ORDERED to provide a status report to the court within twenty (20) days from the date of this order setting forth all efforts which

have been undertaken by them since the time of this court's initial memorandum opinion and order [Docs. 132, 133] entered on January 25, 1989 regarding the above unconstitutional conditions of confinement.

ENTER:

/s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT JUDGE